16979

No. 143.

Brief of Monteith for Pl'ff in Error.

Filed Dec. 13, 1900.

Office Supreme Court U.S.
FILED
DEC 13 1900
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1900.

No. 143.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

vs.

L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED,
DEFENDANT IN ERROR.

# BRIEF OF PLAINTIFFS IN ERROR

GEO. W. MONTEITH,
ATTORNEY FOR PLAINTIFFS IN ERROR.

(17,533.)

FILED DECEMBER 1900.

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# BRIEF OF PLAINTIFFS IN ERROR

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16981

IN THE SUPREME COURT OF THE UNITED STATES.

JACOB GARDNER AND PETER GARDNER,

Plaintiffs in Error,

vs.

LEWIS H. BONESTELL,

Executor of the Estate of Ebenezer Wormouth, Deceased.

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# BRIEF OF PLAINTIFFS IN ERROR

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## SYLLABUS.

There were two distinct sets of issues upon two distinct sets of pleadings, separately made up, separately tried, separately decided and incorporated in one judgment, viz: *Legal*, involving the title under a treaty—*Equitable*, involving a right to a patent (in the nature of a quitclaim) under a statute of the United States.

### I. LEGAL ISSUES—Ejectment Proceeding.

Involved the question as to whether or not the land in dispute under the treaty of Guadalupe Hidalgo was public or private land, Gardner holding the Mexican or private land title without dispute and Wormouth claiming to hold a title from the United States. Gardner's title was confirmed by final decree of the District Court of the United States under the Act of March 3d, 1851, confirming the title of the Reed heirs to the Rancho Corte Madera del Presidio. The Land Department excluded this land from the final survey of the grant, and the State Courts held its decision conclusive, though made

upon unconflicting evidence that the land in dispute was a part of that of which juridical possession was delivered to Reed, and operated to dispossess Gardner, notwithstanding the sixty years' continuous occupation by himself and predecessors in estate and not questioning that it was originally an integral part of the grant possessed by Reed's heirs when the treaty was made and the decree of the District Court was entered.

*Questions Stated.*

First—That Jacob Gardner had absolute title and right to the land in question under the Treaty of Guadalupe Hidalgo, the Act of March 3d, 1851, and the final decree of the District Court of January 14th, 1856.

Second—That Wormouth could not recover in any event because he was without title, owing to the fact the land was actually occupied by another under color of right when he made his entry.

Third—That the Gardner title was *res adjudicata*, and not subject to redetermination in any Court—the State Courts being bound to give full effect to the decree of the District Court.

Fourth—That the State Courts were without jurisdiction of the subject matter of the case—the only question being "Was it public or private land under the treaty?"

II. EQUITABLE ISSUES—To Declare Patent a Trust.

These involved a specific right, asserted solely as a matter of law to a federal patent to the land, under the 7th Section of Act of July 23d, 1866, "To quiet land titles in California"; a right based wholly upon our absolute title under the treaty; and because the land, although a part of a Mexican grant, had been excluded from the final survey by the Land Department; which upon undisputed evidence (none contrary to our claim decided against our right, erring in its decision purely as a matter of law. The decision of both State Courts was against the right we claimed under that statute, to the patent (in effect a quitclaim to quiet our title).

*Questions Stated.*

Fifth—The absolute right of Gardner's predecessor, Throck-

morton, to the patent under the act upon the simple proof of his absolute title under the treaty, coupled with the fact that the land has been erroneously excluded from the final survey and patent;

Sixth—That the Wormouth patent, having been issued without authority of law ,was void as to Gardner, and constituting a fraud upon his title was in equity held by Wormouth in trust for Gardner's benefit.

## STATEMENT OF THE CASE.

The record in this case, without any material conflict, discloses, that on September 4th, 1834, Juan Reed, or Read, petitioned the Mexican Government to grant him a tract of land known as "El Corte de Madera del Presidio" (the place where wood is cut for the Presidio) (Tr., p. 85). The petition was granted October 2d, 1834 (Tr., p. 85-87). Under the Mexican law it became necessary for the magistrate nearest the land to make an examination and survey; place him in physical possession; reduce the examination and survey to writing; and annex them to the petition and grant, which together with the *diseno* (a sort of a sketch map of the premises) would constitute the *expediente* or title papers of the grantee. This was all done in due form, and upon Nov. 28th, 1835, Juan Reed was placed in full possession of the rancho. The *expediente* (title papers) includes the original petition of Juan Reed (Tr., p. 84-85), marked "Ex. D." in the proceedings in the Land Dept. The grant of Gov. Figueroa (Tr., pp. 85-86), marked "Exhibit E" in the same proceedings; the examination (Tr., pp. 86-87) also in the same proceedings; the grant of juridical possession (Tr., pp. 145-146) and the map or *diseno* (Tr., pp. 46A). The land described in the *expediente* is indicated on the colored map as being within the blue lines C to A, A to A2 and A2 to D, the balance of the boundaries being the high water line that excludes the marsh lands, peninsular island and the water. The evidence shows without any material conflict that the land here in controversy is a part of that of which juridical possession was delivered to Juan Reed, Nov. 28th, 1835. It also shows that he remained in possession of it down to the time of his death in 1843, when his four children succeeded to his title and possession. One of them, a minor, dying without issue, the other three, John J., Inez and Hilaria, became the sole owners of the rancho, and were in

actual possession of it at the time of the Mexican war and of the adoption of the treaty of Guadalupe Hidalgo which provides that:

"Mexicans now established in territories previously belonging to Mexico * * * shall be free to continue where they now reside * * * *retaining the property which they now possess.*"

In order to give full effect to the provisions of the treaty, and to determine in accordance with its provisions the extent of the public domain in California and where the boundaries lay that separated the lands of the United States from those of private owners, Congress passed an act on March 3d, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California" (9 Stat. p. 631). Under this act the final and conclusive settlement of all these questions was left *exclusively* to the District Court of the United States in California, subject to an appeal to the United States Supreme Court.

Under this act, proceedings were immediately begun by the Reed heirs against the United States before the Board of Land Commissioners. The usual decree affirming their title in all respects was duly entered June 13th, 1854 (Tr., pp. 88-89). The United States appealed the case for a trial *do novo*, in the District Court for the Northern District of California, where the matter was fully heard, and on January 14th, 1856, the United States District Court rendered its decision and made its decree, affirming the judgment of the Board of Land Commissioners in all respects. In his opinion in the case Judge Hoffman remarked:

"The case seems to present one of the few instances where every requirement of the law has been fully complied with."

1 Hoffman, Rep. 75 (Land Cases).

The United States declined to appeal and the decree became final April 2d, 1857 (Tr., pp. 90-91).

In 1858, however, a dispute arose bewteen the Reed heirs and the United States Land Department as to whether or not the grant was one of specific quantity, to wit: one square league, or was one of specific boundaries without regard to quantity. It was not denied by the Land Department that Reed and his heirs had been granted and were in possession of the rancho as originally prescribed, and which included the

land here in controversy, but the Land Department claimed that it had been confirmed to the extent of but one square league, and asserted its right to reduce the rancho from something like 1,500 acres more than a league to exactly one league, and directed a surveyor by the name of Mathewson to make such a survey. The Reed heirs contested the survey, and while that contest was going on sold one-quarter interest in the excluded portion to Jas. C. Bolton. When the Land Department raised this question, a large number of persons, who in the vernacular of the country are designated "land jumpers" or "squatters" (Wormouth, the defendant in error, being among them), conceived the idea that the excluded portion of the land would be open to settlement and immediately asserted their claims. Wormouth, as the record shows, attempted to enter the excluded portion in 1859, but made a mistake; locating himself upon land which was not only in the original grant, but was included within the Mathewson survey. In 1864 he moved over upon the excluded portion and upon what is now a part of the land in controversy. The excluded portion at the time he went upon it being in the possession of the Reed heirs and Bolton. Bolton began suit in the United States Circuit Court in ejectment, and Wormouth was one of the defendants. The case was tried, judgment rendered in favor of the Reed title and Wormouth along with the others ejected September 28th, 1871 (Tr., pp. 102-108). Wormouth again entered the land apparently about 1880 or 1881, and built the house and made the improvements upon which he predicated his homestead entry (Tr., p. 133). He had previously made several attempts to enter the land (Tr., p. 12") and filed several entries, and on May 20th, 1881, he made the final entry upon which he bases his present claim.

The case of Bolton *vs.* Van Rynegom, which is the title of the proceedings in the Circuit Court, was appealed to the Supreme Court of the United States and the judgment affirmed by that Court.

Van Rynegom *v.* Bolton, 95 U. S., 35.

In the meantime the contest in the Land Department upon the Mathewson survey had been pending thirteen or fourteen years and on January 6th, 1872, Secretary Delano rendered a decision holding in terms that the grant was one of boundaries and not of quantity, set aside the Mathewson survey and ordered a new survey in conformity to the decree of the Dis-

trict Court. An actual survey was never made in accordance with the ruling of that decision, but a map was compiled by two surveyors, Ransom and Allardt. This was also the subject of a great deal of contest in the Land Department. Two Secretaries of the Interior, following Delano, as their public reports show, modified or attempted to set aside the decision of Secretary Delano, and later on Secretary Teller set aside both of their decisions and held that the decision of Secretary Delano was the rule to be followed in the Department, and that no subsequent Secretary had any power to change it under the law. Later on his decision was disregarded and a patent was issued and received by the Reed heirs in 1884, based upon the compilation of Ransom and Allardt (its western boundary following the yellow line on the colored map). The patent radically changes the original grant, it includes a portion that Mathewson excluded; it excludes, however, the remaining portion of the grant which he excluded and which includes the land in controversy. This compilation also includes a large amount of unoccupied tide or salt-marsh land, which Reed never possessed and which was never included within the boundaries of the grant, indeed, a species of land never included in any Mexican grant; a fact that stands uncontradicted as a part of the judicial history of this country. The Reeds, however, accepted the patent thirteen years after they had parted with all title to the portion of the grant the Mathewson survey excluded.

When the Land Department ordered the rancho to be reduced to exactly one square league it was not in anywise because it contended that the Reeds were not or had not been, both at the time of the treaty and long prior, in actual possession of the land within the boundaries specified in the Mexican grant. On the contrary there was no dispute on that at all; the Land Department simply construed the decree of the District Court to confirm the grant as one of *specific quantity* without regard to the amount within the designated boundaries, and *not of particular boundaries* without regard to the quantity. In short, the Department *construed* the decree to confirm the grant as to quantity as against specific boundaries, but by Secretary Delano's decision in 1871 the Department definitely abandoned this contention and ordered a new survey to be made according to the boundaries of the Reeds' actual possession at the time the treaty was made. This the record shows was never made, but a map was compiled by two surveyors,

Ransome and Alfaro, upon which the patent was issued in 1885.

This map and patent wholly violated the boundaries specified in the Mexican grant and as confirmed by the decree of the United States District Court in 1856; it excluded the V-shaped portion of the rancho that on the colored map lies between the yellow line B to B2 and the blue line A to A2 (including the land in controversy), while it included all the marsh land and the "peninsular island" which the Reeds never possessed before the patent issued, and it gave the Reeds nearly two leagues of land. They had already parted with the V-shaped piece, so they by this process received the benefit not only of the original grant but of all these extra thousands of acres, including this valuable island. In the meantime Bolton's interest in the excluded portion through mesne conveyances was acquired by S. R. Throckmorton, and the Reed heirs conveyed their interest in the excluded portion to various persons, all of whom on February 1st, 1871, conveyed their interest in the land here in controversy to Julius C. McCeney (Tr., pp. 98-99), who received the same in trust for Throckmorton, conveying it to him January 19, 1875 (Tr., p. 99). Throckmorton, therefore, in 1875, absolutely succeeded to the entire Reed title to the premises here in controversy.

The title to which Throckmorton succeeded was one never questioned until 1858, when the Land Department construed the grant to be one of specific quantity and not one of specific boundaries. When that contention was declared untenable by the United States Circuit and Supreme Courts in the case of Bolton v. Van Rynegom and abandoned by the Department by Secretary Delano's decision in 1871, it would seem to settle the matter forever, but although that contention was abandoned the Department went to work and issued a patent that in nowise follows the decree of the District Court.

The Reed title was solely a right under the treaty of Guadalupe Hidalgo to the very land the Reeds lawfully possessed when the treaty went into effect and to none other. The Land Department in issuing the patent assumed to dispossess the Reeds' innocent grantees and successors in interest of some hundreds of acres actually within their possession when the treaty was made and went into effect, and in addition to that to turn over to the Reeds a large amount of land they never pretended to have possessed. In short, the United States District Court had judicially determined the extent of the Reed

right, title and possession under the treaty and had definitely fixed the boundaries that separated it from the public domain, while the Land Department assumed to fix a new set of boundaries and redetermine the extent of the Reed holding.

On October 20th, 1880, Throckmorton, in order to settle the question, remove a cloud upon and fortify his title, made application under an act of Congress entitled "An Act to Quiet Land Titles in California," approved July 23d, 1866, to the Land Department for a patent, which would have the effect of being a quitclaim of the Government's claim to the land, and his application was contested by Wormouth (Tr., pp. 46-118 inclusive). In support of his application, Throckmorton proved in the Land Department his title to the premises and also proved *without any evidence to the contrary, that the land here in controversy was a part of the land possessed by the Reeds.* There was no conflict in the evidence before the Land Department whatever, but the Land Department refused his application by a decision of Assistant Secretary Chandler, dated October 24th, 1891. *There were no issues of fact before the Land Department upon this application at all, there being no material conflict in the testimony, and as there was no dispute in the testimony and were no issues of fact to decide*, the decison of the Secretary is, as a consequence, simply *a decision upon the legal effect of the facts proved, standing as admitted facts*—a decision upon the law in the case alone.

While Throckmorton's application was pending before the Interior Department he died, and his only heir and daughter Susanna, succeeded to his estate, and she in turn conveyed the property here in controversy to Jacob Gardner.

From 1835 down to the time of the conveyance to Jacob Gardner, the property had been in the lawful possession of Throckmorton, his daughter Susanna and his predecessors in estate, saving that during portions of the time Wormouth forcibly possessed himself of less than one-quarter of the 46 acres here in controversy. Wormouth himself in his testimony admits (Tr., p. 136) that he never was in possession of 33 acres of the 46. Jacob Gardner, therefore, went into legal possession of all of the property when he obtained his deed July 17th, 1890, and into actual possession of the 33 acres, being forcibly prevented by Wormouth from obtaining physical possession of the other 10 or 11 acres, all of which the record shows without any conflict. The condition as to possession which existed at that time has existed ever since and still exists, Gardner being now in possession.

On May 20th, 1881, Wormouth filed in the Land Department his homestead entry for this land. At that time Throckmorton was in lawful possession of it and was in actual possession of all except the portion that Wormouth possessed himself of by his forcible entry.

Upon July 29th, 1892, shortly after the Land Department had refused Throckmorton's application to obtain the Government patent, Wormouth commenced this action in ejectment in the usual form in which all actions of ejectment are begun in California (Tr., pp. 1-14). The Gardners thereupon filed their answer (Tr., pp. 4-9), and later on by leave of Court (Tr., pp. 19-20), filed a supplementary answer (Tr., pp. 10-18 inclusive), amending their original answer. At the same time Jacob Gardner also by leave of Court filed his cross-complaint (Tr., pp. 18-25), to which Wormouth filed his answer (Tr., pp. 25-30 inclusive). To separate sets of issues were thus made up, to wit: legal and equitable. They were separately tried, the equitable being tried first. There was no material conflict in the testimony on either branch of the case, no issues of fact made on either trial, notwithstanding which the trial Judge assumed to find upon issues as of fact, in spite of the plain fact that the sole issues were issues of law upon uncontroverted facts.

The equitable issues turn wholly upon the proceedings in the Land Department (Tr., pp. 46-118 inclusive), and the findings in that branch of the case (Tr., pp. 31-36). The legal issues are to be determined upon all the evidence printed, except the oral testimony of E. Wormouth on the equitable branch. By stipulation (Tr., p. 155), all the written evidence upon the equitable branch is in evidence on the legal branch of the case, and this includes the transcript of proceedings in the Land Department.

The case was decided in Wormouth's favor by the Superior Court, and the Gardners appealed to the State Supreme Court, where the issues upon both the legal and equitable branches of the case were extensively argued. In the California Supreme Court the appellant challenged the jurisdiction of the California Courts to determine the legal branch of the case as it was simply a readjudication of a treaty right, that under the Act of March 3d, 1851, the United States Courts had exclusive jurisdiction to determine—in other words, a case wherein the Superior Court had undertaken to redetermine whether the land in controversy was, under the treaty of

Guadalupe Hidalgo, public or private land. The issues in the Supreme Court were grouped and argued under two heads to wit: Part I—LEGAL ISSUES; Part II—EQUITABLE ISSUES.

## QUESTIONS INVOLVED.

The main controversy here is over the answer to the following question:

*Was the land in dispute under the Treaty of Guadalupe Hidalgo public or private land?*

Manifestly under the Act of March 3d, 1851, the United States District Court settled that question legally forever, when it made its final decree on January 14th, 1856, wherein it held in terms that the grant was in all respects valid, accordingly as juridical possession had been delivered to Juan Reed in 1835.

The land then actually delivered to Reed included the controverted premises, and was thereafter held by him as an integral portion of the "Rancho Corte Madera del Presidio" until his death in 1843, and thereafter by his heirs, whose lawful successor by mesne conveyance Jacob Gardner, plaintiff in error, is.

It is conceded that Gardner holds the Reed title to the land in dispute, and that he and his predecessors in estate have held actual and continuous possession of the land under that title from the day juridical possession was delivered in 1835 to Reed down to the present time (saving that Wormouth forcibly possessed himself of a few acres which he has since forcibly held; a fact which in nowise affects Gardner's legal rights).

There are two titles before the Court:

*First*—That of Gardner from Mexico, which long antedates the American conquest and the treaty.

*Second*—That of Wormouth from the United States, acquired long after the conquest and treaty.

That Gardner has the Mexican title is unquestioned.

That Wormouth holds wholly under the United States is not denied, but the validity of his title from the United States is not admitted (because Gardner's predecessor was in possession when the entry was made, see point II post page et seq.)

That there was no dispute about the land in controversy being private land under the treaty down to 1859 is not gainsaid.

The whole dispute originally grew out of *the contention of the*

*Land Department* that the decree of the District Court only confirmed the grant *as one of specific quantity*—one square league—and its attempting to reduce the actual possession of the Reeds to one square league by lopping off the 1,500 acres its specified boundaries included in excess of a league.

The dispute in 1859 was simply a question *as to the effect of the decree*—if it was one of specific quantity the Land Department must follow its mandate and reduce it accordingly, *but if one of specific boundaries regardless of quantity*, then its survey must conform to the lines laid down in the decree. The duty of the Department was purely ministerial—an executive function. When the Department had Mathewson survey it in accordance with its contention, it caused him to cut out the 1,500 acres in excess of a league, and Wormouth among others thinking it was Government land—was a part of the public domain—proceeded to "jump" the excluded lands in an effort to get title from the United States. *Clearly Wormouth's right was wholly dependant upon the correctness of the contention of the Land Department* that the confirmation was to the extent of a league only—in short, *if it was a grant of specific quantity, the excluded portion was part of the Federal domain*, and under proper conditions subject to Wormouth's entry, *but if not a grant of specific quantity, but a grant by definite boundaries*, regardless of quantity, then manifestly the 1,500 acres excluded was unlawfully excluded *and the land was under the treaty private not public land*, and of course not subject to entry. There being no question as to the Reeds having possession of the land according to its boundaries (which includes the land in dispute) the only question was, Were they holding too much or not? If the decree so held, the Land Department must cut it down—if it did not so hold, the Department was powerless to change the Reeds possessions; for its duty—purely ministerial—*was to survey the land in accordance with the decree and upon the lines of the Reeds possessions; they conforming to the decree.*

The Department could only follow the decree and could lawfully in nowise alter its effect.

But the Department in 1859 followed its own construction of the decree, and by the Mathewson survey reduced the grant to one square league.

The Reeds and their successors in interest fought this bitterly by a contest in the Department and by an action in the United States Circuit Court in ejectment (Tr., pp. 102-109).

against the squatters who had settled in the excluded portion. (Wormouth's name was misprinted "Edward Wormouth." Wormouth says (Tr., p. 76), he was a defendant).

*The Department through Secretary Delano in 1871 sustained the Reed contention, and held the grant to be one of boundaries*, and ordered a new survey *in accordance with the decree*.

In the Circuit Court, and in the ejectment case, the Reed contention was again upheld and the grant in that case (entitled Bolton v. Van Rynegom et al.) held to be one of boundaries—a decision affirmed on appeal by the Supreme Court of the United States.

Bolton *v.* Van Rynegom, 95 U. S. 33.

These two decisions effectually quieted the contention that the grant was one of specific quantity and left the Land Department but one thing to do, and that one thing it never did, viz: to survey the grant in accordance with the decree of the District Court.

On the contrary it simply *compiled a map* (Tr., p. 68), and in 1885 issued to the Reeds a patent in conformity to this map.

By this proceeding the Department included *but a portion of the 1,500 acres Mathewson had excluded* to reduce the grant to a square league, leaving out the balance of the 1,500 acres of the original Reed possession (which last excluded portion includes the land in question and on the colored map lies between the blue line "A" to "A2" and the yellow line "B" to "B2"; then more than that the Department patented to the Reeds all the marsh land (in green) and the large "Peninsular Island," none of which the Reeds ever before possessed and all of which lay outside of the original grant to Juan Reed in 1834 *and never before either claimed or possessed by him or his heirs*. The Reeds having, long before this patent issued, sold all their interest in the 1,500 acres Mathewson excluded, their acceptance of the patent in 1885 could not operate to injure their successors in interest.

It will be seen that the Land Department clearly exceeded its authority when it so flagrantly violated the requirements of the decree of the District Court, for its action was tantamount to assuming to readjudicate the question decided by the District Court as to where the boundaries lay that separated the public domain from the private lands of the heirs of Juan Reed.

*The District Court decreed one set of boundaries, which included the land in controversy within the grant, while the Land Depart-*

*ment surveyed another set of boundaries, which excludes the land in controversy.*

*The District Court held this land under the provisions of the treaty private land*, while the Land Department held it to be public land; the latter permitted Wormouth to enter the land *while Gardner's predecessor in estate (Throckmorton) was in actual possession, and issued him a patent*, upon which, together with his forcible entry, he bases his action in ejectment herein.

The Superior Court held with the Land Department and the State Supreme Court affirmed its judgment, both holding in effect that the Land Department had full power to practically readjudicate the grant—a power the Act of March 3d, 1851, conferred exclusively on the District Court, subject to an appeal to the United States Supreme Court. *The State Courts adjudged the patent to be conclusive upon Jacob Gardner*, whose claim was wholly *against and not under* the United States, and held in effect that the Department could decide issues of title and estate to and in land between litigants wherein one claimed title under and others who claimed title against the United States.

While the Reed patent was under discussion in the Land Department, Throckmorton, Gardner's predecessor in estate, made application to the Department for a patent (in the nature of a quitclaim) under the Act of July 23d, 1866 (14 Stat. 218).

This application was contested by Wormouth, and was tried in the Department (Tr., pp. 46-118). Throckmorton proved his title and possession without a scintilla of legal or material evidence against him. There was no conflict in the evidence at all, and consequently no issues of fact to decide. The Department rendered a decision (Tr., p. 126) against Throckmorton; a decision necessarily of law, for the facts being undisputed it could not be otherwise.

When Wormouth filed his application for a homestead in 1881 (Tr., p. 132) Throckmorton, Gardner's predecessor, was in possession of all saving the small amount Wormouth forcibly held.

Wormouth completed his proofs in a formal way soon after Throckmorton's application had been rejected and received a final receipt, July 22d, 1892 (Tr., p. 133), and August 14th, 1893, received his patent, the latter being received after this action was commenced.

At the time Wormouth received his final receipt he was in possession of a small portion of the land in controversy (see dotted line on map on transcript, p. 120 C). The dotted line it will be seen shows the fence that Wormouth put up when he took forcible possession and had made his entry partly upon the patented land.

Therefore, at the time Wormouth got his final receipt, he forcibly held that portion of the disputed premises that is within that dotted line marked "old fence," while Gardner was in possession of the balance, or this is the condition that still exists. Before permitting Wormouth to enter the land and make his proofs, the Land Department was fully informed on the subject, as the records show, never caused any action to be brought by the United States to oust Gardner or any of his predecessors *who had held this land continuously for nearly sixty years under a title against the Government.* In other words, the Government had done nothing to obtain a judicial determination that the land was a part of the public domain, and the only basis upon which that rested was the act of the Land Department compiling the map which excluded the land in dispute.

As a result we have these two contending parties claiming the land, the one standing in the shoes of the Mexican grantee and the other in the shoes of the United States; the one holding the Mexican title and the other holding the American title. The American title was one based purely upon the conquest, which the Mexican title long antedated. Therefore, that act determined which title should prevail, and that was a treaty between the conqueror and the conquered; that treaty was the treaty of Guadalupe Hidalgo. By the terms of that treaty all of the land which passed under the sovereignty and jurisdiction of the United States became part of the Federal domain, saving that which had been previously granted to private owners and was at the time of the conquest held by them.

The evidence in this case shows conclusively without any material conflict that the "Reed Ranch," as the grant is popularly known, was the private holding of the Reed heirs at the time the treaty went into effect. It likewise shows that the land in controversy was an integral part thereof, and that it was so decreed by the United States District Court in 1856 in a final decree.

The question before the District Court was whether or not the land in actual possession of the Reeds, each and every part

thereof including this, was or was not part of the public domain. It was the Mexican title against the American title, and that is the identical question and the only real question that lay between the contending parties in this case at the time Wormouth received his final receipt. It was that question which his ejectment suit presented to the Superior Court for adjudication, and therefore the Superior Court simply held exactly contrary to that held by the District Court in 1856, and denied to the successors of the Reeds the lawful effect of the final decree of the United States Courts in their favor.

After these issues were made up, and before the trial, Wormouth obtained his patent and Gardner filed a cross-suit, claiming that in equity Wormouth held the patent in trust for him, and these equitable issues are likewise concluded by the same proposition, to wit: that the absolute title of the Reed heirs and their successors under the treaty conclusively entitles them in equity to any patent the Land Department may have erroneously issued.

The jurisdiction of the State Courts to redetermine this question of right and title under the treaty which by act of March 3d, 1851, was vested exclusively in the Courts of the United States was clearly questioned in the State Courts.

The judgment of the Superior Court was affirmed by the Supreme Court in all respects, and in its opinion it declines to discuss the legal and jurisdictional issues exhaustively argued and presented to it for its decision. As there is no question raised about this by the defendant in error, that the briefs in the State Supreme Court show this fact they have not been printed, although they appear in the original transcript.

The opinion of the State Supreme Court is in some respects misleading. For example it says (Tr., p. 169):

> "The principal contention of the defendants for a "reversal is in relation to what they call their equitable "title."

This is clearly wrong, for as the foregoing statement shows and as the record establishes beyond controversy, that the principal contention *was that we made under the legal issues*, in the ejectment part of the case, that we had an absolute right and title to this land, while the equitable issue was secondary and dependant upon that claim.

The opinion further says (Tr., p. 170):

> "That contest was one entirely within the jurisdic-
> "tion of the Land Department; that is, each party was
> "endeavoring to get title to what each admitted to be
> "United States Government land which was subject to
> "disposition under the laws of the United States."

There is nothing anywhere in the record that shows anything of the kind, but, as we have already shown, neither we nor any of our predecessors have ever admitted that the land in controversy was United States Government land. The proceedings in the Land Department under the act of 1866 were purely to obtain a quitclaim from the Government, to remove the cloud from our title, and there is nothing anywhere in the record that shows that it was "United States Government land" or was subject to disposition by the Government. The record shows exactly the contrary, and the act itself was an act to "quiet titles" and not to grant them.

Again the opinion states at the end:

> "What appellant (ourselves) claims as his legal title
> "was presented to the jury in the shape of an issue as
> "the damages for detention of the land."

This is radically wrong, for in no way, shape or manner, nor at any time, did we ever ask for any damages; our opponent did, however, and that was the only question determined by the jury, because by stipulation (Tr., p. 137) the main case was decided by the Court.

At the time the opinion was filed we felt upon reading it that because of the number of erroneous statements it contained as to the record the Court must have misapprehended the case, and for that reason filed a petition for rehearing, pointing out the facts; the State Supreme Court without any further opinion made an order in the following language "rehearing denied," thereupon the learned Chief Justice of the State Supreme Court promptly granted this writ of error.

## SPECIFICATION OF ERRORS.

Plaintiff in error specifies the following errors contained in the assignment of errors upon which he relies, to wit:

Part First—EJECTMENT BRANCH OF CASE (Legal Issues).

1—*Gardner's Absolute Title.*

I.

The said Supreme Court of the State of California erred in affirming the judgment of the Superior Court of said State, in and for the County of Marin therein, in the following particulars, to-wit:

(a) In holding and deciding that the finding of said Superior Court upon the evidence before it, to-wit:

"1st. That on the first day of February, A. D. 1891, plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:" (particularly describing the land that was the subject matter of the cause of action then pending between the parties hereto in said Superior Court), was sustained by the evidence in the case.

(b) In not holding and deciding that the said plaintiff therein, Ebenezer Wormouth, was not the owner of the land in controversy, or any part thereof, in that the evidence in said case did show without any material or substantial conflict whatever that the defendant therein, Jacob Gardner, was, on the first day of February, A. D. 1891, the owner of said premises then in the possession thereof, and then entitled to the possession thereof, and from thence hitherto had been the owner, and entitled to the possession thereof, and that his ownership and title to said premises was, by reason of his being through mesne conveyances there in evidence, the successor in interest of John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who, at the time of the acquisition of California from the Mexican government, were the Mexican owners of the premises, and under the Treaty of Guadalupe Hidalgo entitled to remain in possession thereof at that time (their right thereto having been confirmed by the United States District Court for the Northern District of California, in a proper proceeding concerning the same, under the Act of Congress of

March 23, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California."

(c) In holding and deciding that the finding of said Superior Court, to-wit

"That on said first day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without any right and title, wrongfully and unlawfully entered into and upon the same and ousted and ejected plaintiff from the same" (excepting certain specific portions), was sustained by the evidence in said case.

(d) In not holding and deciding that upon the first day of February, A. D. 1891, the said defendant, Jacob Gardner, was lawfully in the possession of said land and premises under a title, right and possession acquired by him through mesne conveyances from Juan Reed, who, in 1835, had obtained a valid title to said premises from the Mexican government, and whose heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, at the time the Treaty of Guadalupe Hidalgo was made, were in possession of, and who were entitled thereto under said treaty, and who from the time of said treaty, by themselves and by their successors, including said Jacob Gardner, had been in lawful, continuous, actual and adverse possession of said premises from the month of November, 1835, down to and including the said first day of February, A. D. 1891.

(e) In not holding and deciding that the evidence before said Superior Court, as contained in the record upon the appeal therefrom to said Supreme Court of said State of California, did show, without any material or substantial conflict, that Jacob Gardner was the owner of said premises, in the possession thereof, and entitled to a possession thereof, under a valid and vested right and title thereto, under the Constitution and laws of the United States, and under the Treaty of Guadalupe Hidalgo, and as the lawful successor in interest of the said John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, to whom the same had been decreed by the United States District Court in and for the Northern District of California.

## IX.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not re-

versing the same, upon the ground that the finding of the Superior Court, to-wit:

"2nd. That on said first day of February, A. D. 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said lands and premises the defendants, without right or title, wrongfully and unlawfully entered into and upon the same," and ousted and ejected plaintiff from the same (excepting a certain portion thereof therein described), was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence.

X.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the instruction of said Superior Court to the jury upon the trial in said Superior Court, whereby said jury was instructed that its verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the possession of the land in controversy, was under the Constitution, treaties and laws of the United States, contrary to and unsustained by the evidence in that the evidence without any material or substantial conflict showed an absolute right and title thereto in said Jacob Gardner, under said treaty and the Constitution and laws of the United States.

XI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that the finding of said Superior Court, and the verdict of the jury therein, upon which said judgment was based, were under the Constitution, treaties and laws of the United States wholly unsupported and unsustained by the evidence, and were contrary to the same adduced upon the trial in said Superior Court, it appearing in the record on appeal before said Supreme Court, without any material or substantial conflict, that said Jacob Gardner held absolute right and title thereto, under the provisions of said treaty and the laws of the United States relating thereto.

XII.

The Supreme Court of the State of California erred in affirm-

ing the judgment of said Superior Court, and in not reversing the same, upon the ground that the evidence before said Superior Court appearing in the record on appeal before said Supreme Court, did show, without any material or substantial conflict, that the lands in controversy lay east of the western boundary of the Rancho Corte Madera del Presidio, and were included therein, accordingly as the same were possessed by Juan Reed from November, 1835, and by him down to the time of his death, by his heirs after his death, and by their successors in interest, down to and including the said defendant therein, Jacob Gardner, secured by said treaty and the Constitution and laws of the United States.

XIII.

The Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence before said Superior Court, without any material or substantial conflict, that the premises in controversy were included within the boundaries of the Rancho Corte Madera del Presidio, accordingly as the same were secured by said treaty and confirmed to the heirs of Juan Reed by the final decree of the United States District Court of the Northern District of California, of January 14, 1856, and because that the title and interest of the said heirs of the said Reed to the premises in controversy had become vested in said defendant, Jacob Gardner, through mesne conveyances from their successors in interest.

XIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed title to the premises in controversy, under the treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who became then possessed thereof and was possessed thereof from that time until his death in 1843, at which time his title and possession of said premises descended and became vested in and were possessed

by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who as his heirs, and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California in a decree which became final and filed in said District Court January 14, 1856; the title of said heirs of said Juan Reed thereto, through mesne conveyances upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court, the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid title claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said title claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and because the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same; and because, by reason of said decision of said Supreme Court of the State of California affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his title to said premises duly claimed by him and duly vested in him by reason of said Treaty of Guadalupe Hidalgo and by reason of the Con-

stitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the following ground: That in said Superior Court and in said Supreme Court the said defendant, Jacob Gardner, claimed right and title to the premises in controversy, under the Treaty of Guadalupe Hidalgo, based upon the original grant of said premises by the Mexican Government, prior to the acquisition of California by the United States, and in November, 1835, to Juan Reed, who then became possessed thereof, and was possessed thereof from that time until his death in 1843, at which time his right and possession of said premises descended and became vested in and were possessed by his children, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, who, as his heirs and as the lawful owners thereof, were at the time of the acquisition of California by the United States and of the execution of the Treaty of Guadalupe Hidalgo, Mexicans and residents of California, and in possession of said premises, and who then elected to remain therein, and who under the Treaty of Guadalupe Hidalgo aforesaid, were entitled to retain the property they then possessed, which included the premises in controversy, and whose right and title thereto was confirmed by the United States District Court of the Northern District of California, in a decree which became final, and filed in said District Court, January 14, 1856; the right of said heirs of said Juan Reed thereto, through mesne conveyances, upon the 17th day of July, 1890, having been acquired by said defendant, Jacob Gardner, of Susanna M. Throckmorton, who was then in possession thereof, and who had acquired the same by descent and through mesne conveyances, set forth in the pleadings in said cause in said Superior Court, as the lawful successors in interest of the said heirs of Juan Reed; the possession of the said Jacob Gardner of said premises continuing ever since that time, and said premises having been in the actual, adverse and lawful possession of the successors in interest of the said heirs of Juan Reed, down to and including said Susanna M. Throckmorton, and said defendant, Jacob Gardner, as shown in said pleadings in said Superior Court,

the allegations in said pleadings being fully sustained by the evidence appearing in the record of said Superior Court contained in the transcript on appeal before said Supreme Court, and sustaining, without any material or substantial conflict, the aforesaid right claimed by said defendant, Jacob Gardner, under said treaty; that the finding, decision and judgment of said Superior Court thereon was against said right claimed by said defendant, Jacob Gardner, under said treaty as aforesaid, and should have been reversed by said Supreme Court of said State of California, as a matter of law, and before the evidence before said Superior Court, without any material or substantial conflict, fully proved and sustained the same. And because, by reason of said decision of said Supreme Court of the State of California, affirming the judgment of said Superior Court as aforesaid, the said defendant, Jacob Gardner, was denied his right to said premises duly claimed by him and duly vested in him, by reason of said Treaty of Guadalupe Hidalgo, and by reason of the Constitution and laws of the United States, so far as the same relate thereto, and by reason of which said judgment of said Superior Court should have been reversed by said Supreme Court.

XXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said title of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, in that its decision and judgment affirming the same was against said right of said defendant, Jacob Gardner, under said Treaty of Guadalupe Hidalgo, and the Constitution and laws of the United States, to the premises in controversy.

XXIV.

That said Supreme Court of the State of California erred in

not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was against the right and title of said Jacob Gardner to said premises as secured to his predecessors by said Treaty of Guadalupe Hidalgo.

XXVI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, on the ground that the title and the right was one insured and guaranteed to the said heirs of said Juan Reed, and to their successors in interest, including said defendant, Jacob Gardner, under said Act of Congress of March 3, 1851, to the premises in controversy.

XXVIII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the sole question of right and title to the premises in controversy, before said Superior Court, was upon the validity of the right and title to said premises claimed by said Jacob Gardner, whose claim was that, as the successor in interest of said Reed heirs, the Mexicans who owned and possessed said premises at the time said treaty was executed and went into effect, his right and title to said premises which was secured to said Reed heirs by said treaty, and of the Constitution and laws of the United States relating thereto, and which had been confirmed to them by said United States District Court of the Northern District of California, by its said decree of January 14, 1856, and that his ownership of said premises was the same ownership as their ownership and as their lawful successor in interest thereto, and that their possession beginning with that of their ancestor, Juan Reed, in November, 1835, had continued uninterruptedly through them and their several successors in interest down to and including the said Jacob Gardner, at the time of the commencement of said action, and ever since, and that his said right and title to said premises was the only issue before said Superior Court, upon which it based the following findings, to-wit:

1st. That on the 1st day of February, A. D. 1891, the plain-

tiff, Ebenezer Wormouth, was and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises situate, lying and being in the County of Marin, State of California, and bounded and described as follows, to-wit:

Beginning at a post marked "C. M. P. 180," said post being in the exterior boundary line of the official survey of the Rancho Corte Madera del Presidio; running thence along said boundary line due north 2.45 chains to a post marked "C. M. P. 181"; thence north 9 degrees east 20.25 chains; thence leaving said boundary line due west 26.00 chains, more or less, to the creek on the easterly boundary of the Rancho Saucelito; thence descending said creek to the point of beginning, being lot 3 of Section 28, and lot 3 of Section 29, township 1 north, of Range No. 6 west, M. D. M., containing 46 acres and 26-100. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining." And that the judgment of said Superior Court, being based upon that finding and decision against said title and right claimed under said treaty by the said Gardner, was contrary to the provisions of the Constitution, treaties and laws of the United States relating thereto, and operated to destroy, set aside and annul a valid and vested right and title belonging to the said Gardner under the provisions of said treaty, and the Constitution and laws of the United States.

## XXIX.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that there was no evidence before said Superior Court upon which there was raised any material or substantial issue of fact upon any point or question involved in said claim of right and title of said Jacob Gardner, under said treaty, and there was nothing to sustain said finding set out in the preceding assignment of error number XXVIII, and that said finding of said Superior Court was found by said Superior Court solely because it appeared that the said Land Department had issued a patent to said Reed heirs after they had parted with their title and possession to the premises in controversy to certain of their successors in

estate, who were the predecessors in estate of the said Jacob Gardner, and which patent fixed the boundaries of said Rancho Corte Madera del Presidio upon different lines from those established by said decree of said United States District Court, of January 14, 1856, in this, to-wit: the said decree of said United States District Court adjudged said boundaries to be the same as laid down in the original grant of said rancho to said Juan Reed in 1835, and which grant of possession fixed the western boundary of said rancho upon a line that ran west of the premises in controversy, and which began as therein specified at the "solar" or house lot of the said Juan Reed, and thence ran north to the waters of the Arroyo Holon, and that the northern boundary of said rancho, beginning where said western boundary ended at a forest of redwoods in said Arroyo Holon, continued eastwardly along the waters of said Arroyo Holon, and that said western and northern boundaries as laid down and fixed in said grant of possession to said Juan Reed which was confirmed by and which became a part of said decree of said District Court, including the premises in controversy, within the boundaries of said rancho, and the said rancho, according to said boundaries, and after his death, as aforesaid, his said heirs went into possession thereof, and continued in actual possession thereof until they conveyed the same to the predecessors of said Jacob Gardner, as alleged in the cross-complaint of Jacob Gardner in said Superior Court.

That according to said grant of possession to said Juan Reed, confirmed by said District Court, as aforesaid, the said western boundary beginning at said "solar" as aforesaid, went thence west of north accordingly as exemplified therein, and particularly in the map attached to said grant of possession.

That said patent issued by said Land Department to said Reed heirs was issued upon the 25th day of February, 1885, and the boundaries of said grant, according to said patent, did not commence at said "solar" or house lot, but, on the contrary, commenced at another point about three-quarters of a mile therefrom, and which point was pretended to be said "solar," and they ran said boundary from said pretended "solar" thence south to the Arroyo Corte Madera del Presidio, upon an entirely different line from that fixed and specified by said decree of said District Court, to-wit: said boundaries as laid down in said grant of possession to said Juan Reed; that the western boundary of said rancho, according to said patent, ended at said pretended "solar," and ran east of the

premises in controversy, and wholly excluded from the northern boundary of said rancho the waters of said Arroyo Holon; that said western boundary, according to said patent, beginning at its southernmost point, ran east of north, as against that of said grant of possession, which ran west of north; that said map was based upon a map compiled in said Land Office, and which map was not made lawfully upon a survey under the laws of the United States; that in the evidence in said Superior Court, it was proved, without any material or substantial conflict, that said "solar" was located where said defendant, Jacob Gardner, claimed the same was located, and where the decree of said District Court located it, and said evidence also proved, without any conflict whatever, that the western boundary of said rancho lay west of the premises in controversy and not east of them; that there was no evidence in said record to in any wise sustain, or that even tended to show that the western boundary line contained in said patent conformed in any respect to said decree of said District Court, but on the contrary said evidence, without any material and substantial conflict whatever, showed that said western boundary lay west of said premises, and not east thereof, and that the line as delineated and laid down in said patent in no wise followed the decree of said District Court, but on the contrary said patent specified that the boundaries of said grant commencing at the "solar" went south to the Arroyo Corte Madera del Presidio, wholly contrary to said decree, and in violation of its express mandate, but was made solely by said Land Department, and was made without authority of law.

That the whole basis upon which said finding of said Superior Court was based was the mere fact that said Land Department, in compiling its map and survey, and in issuing its patent, had thereby excluded the premises in controversy from said rancho, contrary to said decree of said United States District Court, and notwithstanding that no court of competent jurisdiction had ever decreed otherwise than said District Court, and that the said Jacob Gardner and his predecessors in estate had held actual, continuous and adverse and lawful possession of said premises from the time the same was originally granted to said Juan Reed in November, 1835, as aforesaid, down to the time of the commencement of said action in said Superior Court, and ever since, and notwithstanding that the right and title of the said Jacob Gardner to said premises was

a right claimed and held under said Treaty of Guadalupe Hidalgo, under said decree of said District Court, and under the Constitution and laws of the United States, and which had been finally settled and adjudicated.

II—*Wormouth's Want of Title.*

II.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same upon the ground that it appeared in evidence in the record before said Supreme Court, without any material or substantial conflict, that under the Constitution and laws of the United States the right and title claimed by the said plaintiff Wormouth to the premises was invalid, and was based upon and under a pretended homestead entry that had been made by the said Wormouth in the United States Land Office at San Francisco, California, and that was predicated upon a forcible entry of the said Wormouth into a portion of the premises in controversy, at a time when the predecessors in interest of the said Jacob Gardner were in lawful, actual, exclusive and adverse possession thereof, and at a time when the United States was not in possession of any portion thereof.

III.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the title claimed by said plaintiff Wormouth was one based wholly upon and under the laws of the United States, with reference to the disposition and sale of the public lands of the United States by the United States Land Department, and was one wherein the officers of said Land Department had assumed to convey to the said Wormouth the premises in controversy, which the evidence in the record before said Supreme Court did show, without any material or substantial conflict, never was a part of, and never had been a part of or included within the public lands of the United States, and to which the United States

never had any lawful right, title or interest in, or claim to, and which the officers of the United States in the Land Office at San Francisco, California, and in the Land Department of the United States, never had or had had any jurisdiction of or control over, under the laws and Constitution of the United States, but which for many years prior to, and at the time of the acquisition of California by the United States, under said treaty, were and ever since have been private lands, and held and owned by the predecessors in interest of said Jacob Gardner, whose title thereto accrued long before the making of said Treaty of Guadalupe Hidalgo, between the United States and the Republic of Mexico, and which right and title was recognized by and vested in them by said treaty, and by them, through mesne conveyances, transmitted to said Jacob Gardner.

IV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that it appeared in the evidence in the record before said Supreme Court, without any material or substantial conflict, that the rights claimed by both parties to the premises in controversy were dependent wholly upon, and were under the Constitution, treaties and laws of the United States, and that under the Constitution, treaties and laws of the United States, the title, ownership and right of possession claimed by the said Wormouth were invalid and wholly void.

V.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that as it appeared in the evidence contained in the record before said Supreme Court, without any material or substantial conflict, that the entire claim of the said plaintiff, Wormouth, to the premises was as a homestead claim under the laws of the United States; at the time the proceeding was instituted he had not acquired any title from the United States to the premises.

VIII.

That said Supreme Court of the State of California erred in

affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the finding of said Superior Court, to-wit:

"1st. That on the first day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of, in the possession of, and entitled to the possession of, and from thence hitherto has been the owner of and entitled to the possession of that certain piece or parcel of land and premises" (describing the premises described in the complaint in said action in said Superior Court), was under the Constitution, treaties and laws of the United States wholly contrary to and unsustained by the evidence in said case appearing in the record on appeal before said Supreme Court.

XXXV.

The Supreme Court of the State of California erred in deciding that the decision of the Land Department was conclusive as to Wormouth's title to the premises in controversy, upon the ground that it amounts to the said appellant, Jacob Gardner, being thereby deprived of his property by the State of California, without due process of law, in deciding that the Land Department, by its decision in said contest before it, between said Throckmorton and said Wormouth, that the decision of said Department adverse to said Throckmorton operated to destroy his right and title to said premises under said treaty.

III—*Question Res Adjudicata.*

XXIII.

That said Supreme Court of the State of California erred in not reversing said judgment of said Superior Court, upon the ground that said judgment of said Superior Court was beyond its jurisdiction in that it in effect reviewed and set aside the said decree of said United States District Court of January 14, 1856, so far as the same confirmed the right and title of said Jacob Gardner and his predecessors to said premises.

XXXII.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same upon the ground that the question of right and title decided by said Superior Court was one which had been finally settled and determined by said decree of said United States District Court, and which said Superior Court was without power, authority or jurisdiction to in any wise determine.

IV—*State Courts Without Jurisdiction.*

XV.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, and in not ordering the same dismissed or abated upon the ground that in the record on appeal from said Superior Court before said Supreme Court, it was shown conclusively said Superior Court was without jurisdiction to adjudicate any of the issues involved in said cause of action in that the jurisdiction to determine said controversy lay wholly within the Courts of the United States, under the said Act of Congress of March 3, 1851.

XVII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that said Superior Court was without jurisdiction to determine the subject matter of the controversy involved in said cause of action before it, the same being vested exclusively in the United States District Court for the Northern District of California, by said act of March 3, 1851.

XXVII.

That said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, upon the ground that the said Superior Court, by its said judgment, had

in excess of its authority and jurisdiction decided against and held invalid the right and title of the Reed heirs to the premises in controversy, under the Treaty of Guadalupe Hidalgo, and which was confirmed to them and finally adjudicated valid by the United States District Court, by its said final decree of January 14, 1856, and to which right and title said Jacob Gardner had succeeded, as shown by certain mesne conveyances from said Reed heirs and their successors in interest, mentioned in the pleadings, and proved by the evidence at said trial, without any conflict whatever.

XVIII.

The said Supreme Court of the State of California erred in affirming the judgment of said Superior Court, and in not reversing the same, upon the ground that the controversy before the Superior Court involved the right, title, ownership and possession of the premises there in controversy, which right, title, ownership and possession being dependent wholly upon a treaty of the United States, to-wit: the Treaty of Guadalupe Hidalgo, was by the Constitution and laws of the United States, and particularly by the Act of Congress of March 3, 1851, hereinbefore referred to, exclusively cognizable and determinable in the District Court of the United States of the Northern District of California, and the Supreme Court of the United States, and in that the question of the right, title, ownership and possession there involved had been finally adjudicated and settled in said District Court by a final decree of said District Court, confirming the right and title of the heirs of Juan Reed to the land in controversy (together with other lands), and the right and title thereto being a right and title under said treaty, was drawn in issue in Superior Court, which Superior Court found erroneously adversely thereto, and basing its judgment upon such finding, erroneously rendered judgment against the said defendant, Jacob Gardner, and which judgment was affirmed by said Supreme Court, notwithstanding that said right and said title under said treaty was there fully presented and argued, and the decision of said Supreme Court of the State of California was thereby against said right and said title, under said treaty claimed by the said defendant, Jacob Gardner, as the successor in interest of the said heirs of Juan Reed, the confirmees under said decree of said District Court, and thereby

denied the said defendant, Jacob Gardner's, right and title under said treaty to said premises.

XXV.

That said Supreme Court of the State of California erred in affirming said judgment of said Superior Court, and in not reversing the same, upon the ground that the title, ownership and possession of the premises there in controversy, and the question of title thereto, had been finally adjudicated in the District Court of the United States for the Northern District of California, in its aforesaid decree of January 14, 1856, and upon the further ground of said Superior Court was without power, authority or jurisdiction to change, alter or review the lawful effect of said decree, and was without jurisdiction to settle any right of the parties thereto, or their successors in interest, including said defendant, Jacob Gardner, finally determined or settled or adjudicated thereby.

XXXI.

That said Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the ground that the sole question of title decided by said Superior Court was one wherein the original primary sovereign title of the United States was at issue, i.e., the question as to whether the lands in controversy were ever included with the public land of the United States or not; whether they were under the Treaty of Guadalupe Hidalgo public lands of the United States, or the lands of private owners who possessed them at the time of, and prior to the execution of said Treaty under the laws of the Republic of Mexico; and that the settlement of that question was one particularly under the Act of Congress of March 3, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California," was vested solely in the Courts of the United States, to-wit: The District Court of the Northern District of California, and on appeal therefrom, the Supreme Court of the United States, and because said Superior Court was without jurisdiction to make any determination with which, under the Constitution and laws of the United States, reference to the settlement of that question.

Part Second—EQUITABLE BRANCH.

XXXIII.

That the Supreme Court of the State of California erred in affirming the judgment of said Superior Court and in not reversing the same, upon the following grounds, to-wit:

(a) That the evidence was insufficient to justify the second finding of the Superior Court upon the equitable issues in the case to the effect that one of the questions decided by the United States Commissioner of the General Land Office and by the United States Secretary of the Interior, in the contest of Throckmorton v. Wormouth, mentioned in the 20th paragraph of the cross-complaint in said cause, was a question of fact, namely, the location of the western boundary of the grant made by Governor Figueroa to Juan Reed and that there was no evidence to support said finding.

(b) That the evidence was insufficient to justify the third finding of the Superior Court, upon the equitable issues before it, that the officers of the United States Land Department, to-wit: The Register and Receiver, Commissioner of the General Land Office and the Secretary of the Interior, did decide and find as a fact, upon the evidence produced before said Register and Receiver on said contest, was not included in said original grant by the Mexican Government to Juan Reed, and that there was no evidence to support said finding.

(c) That the evidence was insufficient to justify that portion of the fifth finding of the Superior Court, upon the equitable issues before it, in which it is found that the consideration paid by J. Clinton Bolton to the Reed heirs, John J. Reed, Hilarita M. Reed and Inez Reed Deffebach, for the United States Register and Receiver, and affirmed by the deed to him in 1865, was not a money consideration and that the only consideration which passed from said Bolton to said grantors was the agreement by said Bolton mentioned in said fifth finding, and there is no evidence to support said finding;

(d) The evidence was insufficient to justify the sixth finding of the Superior Court, upon the equitable issues before it, to the effect that the officers of the United States Land Department, to-wit: The United States Register and Receiver, the Commissoner of the General Land Office and the United States Secretary of the Interior, respectively, from the evidence pro-

duced before them in said contest of Throckmorton v. Wormouth, in denying said application of Throckmorton, did not base their decision upon the question of law alone, but did find and decide, as a fact, that said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, but on the contrary the evidence showed that said officers of the United States Land Department based their decision in said contest upon the question of law alone, and did not find and decide that the said Throckmorton was not a purchaser in good faith from Mexican grantees or their assigns, and that there was no evidence to support said finding.

(e) The evidence was insufficient to justify and there was no other evidence to support that portion of seventh finding of the Superior Court, upon the equitable issues before it, wherein it is found that the rancho granted by the Government of California under the Government of Mexico to Juan Reed, did not include within its exterior limits the lands described in the deed from T. B. Deffebach et al. to Julius C. McCeney, of February 14, 1871, or any part thereof except so much as is included in the patent issued on or about the 25th day of February, 1885, by the United States to John J. Reed et al., and the evidence is insufficient to justify, and there is no evidence to support that portion of said seventh finding, wherein it is found that the grant mentioned in the first paragraph of said cross-complaint did not include any part of the land in controversy in this action, and that no grant was ever made by the Mexican Government to Juan Reed or his successors in interest included in any part of the land described and granted to the plaintiff by the United States patent mentioned in the 22d paragraph of said cross-complaint.

(f) The evidence was insufficient to justify and there was no evidence to support the eighth finding of the Superior Court, upon the equitable issues before it, to the effect that the land described in said deed from T. B. Deffebach et al. to Julius C. McCeney, or any part thereof, except as in the seventh finding of the Court set forth, was not within the exterior boundaries of said Mexican grant.

(g) That the evidence was insufficient to justify and there was no evidence to support that portion of the ninth finding of the Superior Court to the effect that the consideration mentioned in the ninth finding of the Superior Court upon the equitable issues before it, to the effect that the consideration

mentioned in the fifth finding upon said equitable issues, was the only consideration for the deed mentioned in said ninth finding.

(h) That the evidence was insufficient to justify and there was no evidence to support that portion of the tenth finding of the Superior Court in the equitable issues before it, in which it found that neither T. B. Deffebach, Inez Reed Deffebach, Hugh A. Boyle or H. C. Newhall did, on the first day of February, 1871, or at any other time, own or were entitled to convey to any one any of the land described in the sixteenth paragraph of said cross-complaint, except a small part thereof, which was described in said tenth finding.

(i) That the evidence was insufficient to justify and there was no evidence to support that portion of the eleventh finding of the Superior Court, upon the equitable issues before it, which is to the effect that Julius C. McCeney on the 19th day of January, 1875, or at any other time, was the owner, and was not entitled to convey any of the land mentioned and described in the deed from said McCeney to said Throckmorton, described in said eleventh finding, save and except that portion of said land which lies within the boundary of said Reed patent.

(j) The evidence was insufficient to justify and there was no evidence to support that portion of the twelfth finding of the Superior Court, upon the equitable issues before it, which is to the effect that none of the grantees named in the deed mentioned or referred to in the 18th paragraph of said cross-complaint purchased the lands or interests described or mentioned in said deeds in good faith, or used or improved or possessed any part of the lands in controversy, except as trespassers upon the possession and rights of the plaintiff, as alleged in his complaint in this action, and that neither the said Throckmorton or his executrix ever had any right to use or improve any part of said lot 3 in section 28, or of said lots 2 and 3 in section 29, and that neither said Throckmorton nor his executrix was ever in the actual possession of the same or any part thereof, except as intruders and trespassers upon the rights and possession of the plaintiff; and the evidence is insufficient to justify, and there is no evidence to support that portion of said twelfth finding which is to the effect that said grantees and each of them, and particularly the said Throckmorton, did not believe in good faith, or at all believe, that all of the lands conveyed by the said deeds, or any part or parcel

of said lot 3 in section 28 and said lots 2 and 3 in said section 29, were included within said Mexican grant, and that said Mexican grant did not purport to grant or convey all or any part of the lands now in lot 3 in section 28 and lots 2 and 3 in section 29.

(k) The evidence was insufficient to justify and there was no evidence to support that portion of the thirteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that there is no evidence to show that the evidence introduced in the matter of the application and contest mentioned in the 19th paragraph of said cross-complaint did not show without conflict that all of the facts set forth in the preceding paragraphs of said cross-complaint were true, or that any of such facts which are denied in the plaintiff's answer herein are or were true, but, on the contrary, the evidence did show that all of said facts mentioned were true.

And the evidence is insufficient to show and there is no evidence to show that the evidence introduced in the matter of said application and contest did not establish all of said facts or any material fact in favor of said Throckmorton's right to purchase said land by competent, or any, evidence, and that there was conflict in said evidence and that there was evidence on said contest that contradicted said Throckmorton's evidence, and the evidence alleged in said cross-complaint was not true, but, on the contrary, said evidence did establish all of said facts in favor of Throckmorton's right by competent evidence and without conflict, and there was, in fact, no evidence of said contest which contradicted Throckmorton's evidence, and it fully appeared from the evidence that all the evidence, as alleged in said cross-complaint on said contest, was true;

And the evidence is insufficient to show, and there is no evidence to show that the Register and Receiver of the Land Office at San Francisco did not, nor did either of them, on the 9th day of February, 1866, or at any other time, base their or his decision upon the evidence as the same is alleged in said cross-complaint, or upon evidence without conflict, but, on the contrary, the evidence fully shows that said Register and Receiver did, on the said 9th day of February, 1886, base their and his decision fully and precisely upon the evidence as the same is alleged in said cross-complaint and upon evidence without conflict;

And the evidence is insufficient to show and there is no evidence to show that the Register and Receiver did not, nor did either of them, rest their or his decision upon the proposition, or upon a proposition of law, that the said Throckmorton was not in law, or under the law, entitled to purchase the said land, and that the Commissioner of the General Land Office, upon appeal from the decision of the Register and Receiver, upon the, or upon a proposition of law in deciding that Throckmorton was not entitled to purchase the said land, and that the said Secretary of the Interior did not rest his decision affirming the decision of the Commissioner of the General Land Office upon the, or upon a proposition of law, and that the said Secretary of the Interior decided and found as a fact from the evidence produced on said contest of Throckmorton v. Wormouth, that said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns of the lands described in paragraph 16 of said cross-complaint, but, on the contrary, the evidence showed that each of the said officers of the Land Department, to wit: the Register and Receiver, the Commissioner and the Secretary of the Interior, based his decison and each of said respective decisions upon the proposition of law, to-wit: the proposition that upon all the facts set forth in said cross-complaint, which were duly established before said officers, and each of them, the said Throckmorton was not in law, or under the law, entitled to purchase the said land.

(l) The evidence was insufficient to justify and there was no evidence to support that portion of the fourteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that the said Throckmorton was not a bona fide purchaser from Mexican grantees or their assigns, and was not entitled to purchase the said land or any part thereof under said act of Congress, and that the Register and Receiver of said Land Office at San Francisco did not, contrary to law, and did not, basing their decision on an erroneous construction of the law applicable to the case before them, allow plaintiff to make proof and payment for the said land, but, on the contrary, the fact was and the proofs before said officers showed without conflict that said Throckmorton was a bona fide purchaser from Mexican grantees and their assigns, and was entitled to purchase the said land and every part thereof under said act, and the Register and Receiver of said Land Office did, contrary to law, basing

their decision on an erroneous construction of the law applicable to the case before them, allow the plaintiff to make proof and payment for said land, and hold in substance that all of the facts set forth in the cross-complaint herein did not entitle said S. R. Throckmorton to purchase said land.

(m) The evidence was insufficient to justify and there was no evidence to support that portion of the fifteenth finding of the Superior Court upon the equitable issues before it, which is to the effect that said Susanna M. Throckmorton was not the owner of the said land when she executed the said deed, and that she was not entitled to convey the same to said Gardner.

(n) The evidence was insufficient to justify, and there was no evidence to support that portion of the sixteenth finding of the Superior Court, upon the equitable issues before it, which is to the effect that Jacob Gardner did not, on the 17th day of July, 1890, or at any other time, enter into the possession thereof, except as an intruder and trespasser.

(o) The evidence was insufficient to justify and there was no evidence to support the seventeenth finding of the Superior Court, upon the equitable issues before it, to the effect that said Jacob Gardner is not, and never was, the owner in equity of said land or any part of the land described in the plaintiff's complaint in this action, and which is also described in the United States patent issued to said plaintiff on the 14th day of August, 1893, as alleged in the 22d paragraph of said cross-complaint, and that said plaintiff does not hold said land, or any part thereof, in trust, or otherwise, or at all, for defendant, Jacob Gardner.

## XXXIV.

The said Supreme Court of the State of California erred in that part of its decision contained in his opinion filed in said cause upon appeal, in the following particulars:

(a) In deciding that "the principal contention of the defendants for reversal was in relation to what they called their equitable title."

(b) In deciding that the contest of Throckmorton referred to in said opinion was one entirely within the jurisdiction of the United States Land Department, in that the record on appeal before said Supreme Court showed without conflict that the contest was not within the jurisdiction of said Land De-

partment, in that it involved a judicial question as to the character of the land in controversy, whether, under the treaty of Guadalupe Hidalgo, it became public land of the United States or remained the private holding of private owners.

(c) In deciding that both parties in said contest in said Land Department were endeavoring to get title in which each admitted the land was United States Government land, and was subject to disposition under the laws of the United States, it appearing in said record on appeal without conflict that said proceeding on the part of Throckmorton was not to obtain title to what he admitted to be United States Government land, but was for the sole purpose of obtaining a quitclaim of the Government's interest in said land, and thereby removing a cloud upon his title.

(d) In deciding that the Land Department had exclusive jurisdiction to determine all the facts which arose in said contest.

(e) In deciding that the decision of the Land Department in said contest was a decision upon the issues of fact specified in said opinion, in that the transcript of the proceedings in said Land Department in evidence in said Superior Court, and contained in said record upon appeal, did show conclusively that all the evidence before said Land Department was without any conflict as to any material fact; that there were no issues of fact before the Land Department, and that the only decision of the Land Department was upon the legal effect of the undisputed facts in the record before it.

(f) In deciding that "Whether Throckmorton did, in fact, purchase the land for a valuable consideration, or whether after his purchase he used and improved and continued in the possession of the same, according to the lines of his purchase, were questions of fact to be determined by the Secretary of the Interior. The good faith of Throckmorton in making the purchase, as well as belief that the land he purchased was included within the original limits of the Mexican grant, were also facts to be determined by that officer, from all the circumstances under which the purchase was made." That the decision in these particulars is erroneous and contrary to the Constitution and laws of the United States, in that the evidence before said Land Department aforesaid, without any material or substantial conflict whatever, did show that at the time Throckmorton made said application to said Land Department, his right and title to said

premises was one that was valid and well vested, and secured to him under said Treaty of Guadalupe Hidalgo, and which had been finally settled and adjudicated in favor of the right and title he claimed by said District Court in its said decree of Jaauary 14, 1856, and that by reason of the fact that Throckmorton, at the time of said application, had absolute title to said premises, and as a matter of law, under the Constitution and laws of the United States, the question as to whether he purchased the land for a valuable consideration, or that, that after his purchase, he used, improved and continued in the actual possession of the same, or that that of his good faith in making the purchase, or that that of his belief that the land he purchased was included within the original limits of the Mexican grant, could not be raised in said Interior Department, said Interior Department being concluded, as a matter of law, upon all those facts, and that therefore, there being no issues of facts before said Land Department, the Secretary of the Interior could not render a decision upon any of those facts, but could only render a decision upon the law in the case, and that its decision was therefore but a decision upon the law in the case.

(g) In deciding that the decision of the Secretary of the Interior was not an erroneous application of the law, and in deciding that its decision was based upon facts which necessarily defeated the claim of Throckmorton.

(h) In deciding that the decision of the United States Land Department, accordingly as the same in said record and appeal was conclusive in favor of respondent Wormouth's title.

(i) In deciding that the other points in the case were unnecessary to be discussed.

## ARGUMENT.

### PART I.—LEGAL ISSUES.

### PRELIMINARY.

This action was commenced in the Superior Court by Wormouth, the plaintiff, and (until his executor Bonestell was substituted) defendant in error herein, filing an ordinary complaint in ejectment (Tr., pp. 1-4). To this Jacob and Peter Gardner, the defendants and the plaintiffs in error herein, filed an answer denying all the allegations of the complaint and asserting an absolute title in Jacob Gardner to the land

in controversy; later the Gardners obtained from the Superior Court an order (Tr., p. 9) allowing them to amend and to supplement their answer, which they accordingly did (Tr., pp. 10-17) and in which they set up a complete title to the land in controversy under the Treaty of Guadalupe Hidalgo, the Constitution and laws of the United States generally, the Act of Congress of March 3d, 1851, "*to settle land titles in California*" particularly, and specifically under a final decree of the United States District Court confirming the title of Gardner's predecessors, the Reed heirs, to the premises in controversy under that act of Congress as a specific right and title under the treaty, they being "Mexicans" in possession and entitled to remain and retain the property they then possessed.

Treaty Guadalupe Hidalgo, Art. VIII.

The complaint sets up:

> "1. That on the first day of February, A. D. 1891, the "plaintiff was, and for a long time prior thereto had "been the owner of, in the possession of, and entitled to "the possession of, and from thence hitherto has been "the owner of and entitled to the possession of that cer- "tain piece or parcel of land, situate, lying and being "in the County of Marin, State of California, and "bounded and described as follows, to wit": (here follows description describing the land, Tr., p. 1—see also map Tr., p. 112C).

The complaint further alleges:

> "11. That on, to wit, the 1st day of February, A. D. "1891, and while this plaintiff was so possessed and "entitled to the possession of said land and premises, "the said defendants, without right or title, wrongfully "and unlawfully entered into and upon the same, and "ousted and ejected the plaintiff from the same (ex- "cept that portion thereof bounded and described as "follows, to wit": (the excepted portion being that contained within the dotted lines on map 120 C).

The third and last paragraph was an allegation of damage, and the prayer for relief asked for a restitution of the premises with damages.

The complaint set out a second cause of action for the purpose of obtaining an injunction, reiterating the above allegations and setting out certain grounds for equitable relief by way of injunction; as the relief sought was purely interlocu-

tory, the second cause of action is wholly immaterial in this Court.

The defendants, Peter Gardner and Jacob Gardner, filed in the Superior Court an answer to said complaint (Tr., p. 4), sets forth that they

> "1st. Deny that on the 1st day of February, 1891, or "any other time, the plaintiff was or for a long time or "any time prior thereto, had been the owner of, or in "the possession of, or entitled to the possession of, or "from thence hitherto, or from any period of time or "ever, has been the owner of or entitled to the posses- "sion of the land described in said complaint or any part "thereof, or any of the tenements, hereditaments, or "appurtenances thereunto belonging or in anywise ap- "pertaining, except that the plaintiff was on said day, "and since that time has been in the possession of, so "much of the said land described in said complaint as "is described as follows": (here follows description in Transcript p. 5).
>
> "2nd. And defendants deny that on the 1st day of "February, 1891, or while the plaintiff was possessed "or entitled to the possession of said land or premises "or any part thereof, except the said portion herein- "before described, the defendants without right or title, "or wrongfully, or unlawfully, or otherwise, or at all, "entered into or upon the said land, or ousted or ejected "the plaintiff from the same, or any part thereof, or "that they ever entered at all into or upon any part of "said excepted parcels of said land, or that said de- "fendants or either of them, have ever since wrong- "fully, or unlawfully, withheld the possession of any "of said land from the plaintiff, or that the defendants "ever ousted or ejected the plaintiff from any part of "said excepted parcels of said land, or that defendants "or either of them, have ever wrongfully, or unlaw- "fully, or otherwise or at all, withheld or still or now "withhold the possession of any part of said excepted "parcels of land hereinbefore described from the plain- "tiff, or that the plaintiff has ever been damaged by "any withholding by defendants of said land from him "in the sum of $500.00 or any other sum of money, but, "on the contrary, these defendants aver that the de- "fendant, Jacob Gardner, and his predecessors in

"estate, were at the date of the commencement of this
"action, and for more than forty years next prior
"thereto, had been and still are the owners of, and in
"the open, actual and adverse possession of all of the
"lands described in said complaint, except so much
"thereof as is hereinbefore described, and that the de-
"fendant, Peter Gardner, has for more than two years
"last been upon the said premises under and in sub-
"ordination to the said Jacob Gardner and his title,"
and then denied the damages.

They also denied the allegations of the second count, while in their supplemental answer the defendants supplemented this allegation by setting up their complete title in detail and the grant to Reed in 1834 by the Mexican Government that the land granted included the premises in controversy (which were correctly described in the deed from Deffebach to McCeney—see Tr., pp. 12-13). The descent of the title from Reed to his heirs in 1843; that the grant was confirmed by the Board of Land Commissioners; whose confirmation was approved by the District Court January 14th, 1856, that made a decree confirming the grant; the making of the Mathewson survey, that excluded the land in controversy; that the patent issued to the Reeds excluded the land in controversy; and then setting up the title to the Reeds through a number of mesne conveyances to Gardner. The chain of title shows that the Reeds parted title to the property many years before they accepted the patent. The supplemental answer also sets up the Wormouth patent and its illegality and that it was in equity held in trust for Gardner.

These pleadings cover the entire ground presented and simply left one question to the Superior Court to decide, "Who was the owner of the premises in controversy, Wormouth or Gardner?" i. e., which of the two titles was the valid one.

Upon the trial of these issues Wormouth testified as to his settlement upon the land, and produced his receipts from the Land Office. By stipulation between the parties (Tr., p. 146) all of the deeds constituting Gardner's chain of title, the grant of juridical possession (Tr., pp. 145-6), the transcript of proceedings in the Land Department (Tr., pp. 46-118), the diseno (Spanish map—Tr., p. 46A), Reed patent (Tr., p. 118), and all the other maps and documents were admitted in evidence. The transcript of proceedings in the Land Department contained a large amount of testimony, maps, deeds, the decree

of the United States District Court (Tr., pp. 91-91), decision of the Board of Land Commissioners (Tr., pp. 88-89), the proceedings in the case of Bolton vs. Van Rynegom (Tr., pp. 102-109), the expediente (Tr., pp. 84-87), the expediente is all in the transcript in the Land Department except the *grant of juridical possession* and *the diseno*, the grant being on Tr., p. 145, and the diseno Tr., p. 46A. On defendants' behalf, defendants both testified, Peter Gardner (Tr., p. 147), and Jacob Gardner (Tr., p. 151).

There were a number of witnesses who testified as to the rental value and damages for detention; the only issues that were submitted to the jury, but those matters are in no wise material here and by stipulation have been omitted from the printed transcript.

It will be seen from the foregoing that the ejectment branch of this case comprising the legal issues was practically tried on an agreed statement of facts and that it left for the decision of the Court, which by stipulation was to decide it (Tr., p. 137 and p. 155-6), simply the question as to which title was valid, the Mexican title of Gardner or the American title of Wormouth, and *the determination of this question rested entirely upon the proposition as to whether or not the land in controversy was public or private land under the treaty.* If it were private land, then Wormouth practically conceded Gardner's title. If on the other hand it were public land under the treaty, Gardner only conceded Wormouth title in case Wormouth's original entry was valid, which the evidence shows it was not, for, as will be shown hereafter, the Gardners being in possession by themselves and their predecessors in estate when the entry was made and ever afterwards, the entry itself was absolutely void.

This shows the condition of the ejectment or legal branch of the case under which we raise four of the six questions we above enumerated and which we will entitle:

1—Gardner's absolute title.
2—Wormouth's want of title.
3—That the question is *res adjudicata*.
4—The State Courts without jurisdiction.

## I. GARDNER'S ABSOLUTE TITLE.

First—*That Jacob Gardner had absolute title and right to the land in question under the treaty of Guadalupe Hidalgo, the act of*

*March 3d, 1851, and the final decree of the District Court of January 14th, 1856.*

The treaty is not mentioned in the pleadings in terms, but the allegations show beyond a doubt the complete title under the treaty, which need not be specially pleaded:

> "to raise the Federal question it is only necessary to "show the complete title under the treaty. The treaty "need not be specially pleaded."
>
> Hickie *v.* Starke, Peters 97.

It was necessary to decide this treaty right to render judgment that gives jurisdiction (the treaty being the same as the statute in this respect).

> California Bank *v.* Kennedy, 167 U. S. 365.

The question must appear to have reason by clear and necessary.

> Ocean Ins. Co. *v.* Polleys, 13 Peters 137.

And to have above necessarily involved.

> Armstrong *v.* Treasurer, 16 Peters 261.

Prior to the grant of juridical possession, it is admitted that the title of the entire Reed Ranch, including the premises in controversy, was in the Mexican Government; that Reed acquired a valid title from that Government; that the premises were actually delivered to him by the grant of juridical possession.

This delivery of juridical possession was the physical delivery of the land, very similar to the common law livery of seisen, as Justice Field points out in the number of cases, notably those of

> Graham *v.* United States.
>
> Pico *v.* United States.
>
> Van Rynegom *v.* Bolton, cited below.

The Mexican Alcalde in the presence of witnesses first surveyed the land after the Mexican custom, and then with the grantee went along the boundaries from landmark to landmark and placed grantee in physical possession of the land. This Court has repeatedly held that the grant of juridical possession in all these cases definitely fixes the land conveyed, and that it is binding upon the Government of the United States, not only by treaty but also by the law of nations, and upon all its officials, who are bound to follow the same lines it prescribes and whose acts are void where they fail to substantially do so in all material respects.

The evidence shows without conflict that the land in con-

troversy is an actual part of that of which juridical possession was delivered in 1835 to Juan Reed; *a fact that stands out in bold relief in every branch of this case and determines every question involved in Gardner's favor.* The grant of juridical possession invested Reed and his successors in the estate with complete title and possession of all of the entire Reed Ranch, which demarkation included the land in controversy. The act of Congress of March 3d, 1851, is entitled "An act to settle land titles in California" (9 Stat. 631) was passed to ascertain and settle these titles as the necessary means of determining the extent of the public domain in California.

It is perfectly plain that the tribunals created by that act, in the first instance the Board of Land Commissioners and the District Court in the second instance, were bound in the case of every valid grant to confirm it according to the grant of juridical possession where the delivery was actually made, as in this case. They could neither enlarge nor reduce it and *in such cases the grant was conclusively held to be one of boundaries,* and it was only in cases of uncertainty as to boundaries or in the absence of a specific grant of juridical possession or where the grant was unmistakably one of specific quantity that this rule was departed from by the Federal Courts. They held over and over again and this Court has said:

> "By this proceeding—called in the language of the "county the delivery of juridical possession—the land "granted was separated from the public domain ,and "what was previously a grant of quantity became a "grant of a specific tract.
>
> "The record of a proceeding of this nature must "necessarily control the action of the officers of the "United States in surveying land claimed under a con- "firmed Mexican grant.
>
> "Survey did not corform to decree, was set aside by "District Court and judgment affirmed."
>
> Graham *v.* United States, 4 Wall. 261.
>
> "Were there any doubt of the intention of the Gov- "ernor to cede all the land contained within the bound- "aries designated by him, it would be removed by the "juridical possession delivered to the grantees. This "proceeding involved an ascertainment and settlement "of the boundaries of the lands granted by the appro-

"priate officers of the Government, specially desig-
"nated for that purpose, and has all the force and effi-
"cacy of a judicial determination. *It bound the former*
"*Government and is equally binding upon the officers of our*
"*Government.*"

Pico *v.* United States, 5 Wall. 539.

The Court also in the case of Van Rynegom *vs.* Bolton, where it referred to this identical property, the Reed Ranch, in its decision in the ejectment case, brought by Gardner's predecessor, Bolton, to eject Wormouth and others when they assumed to "jump" the land after the Mathewson survey, and then the Court said:

"Ordinarily the boundaries thus established would
"be accepted as conclusive by our Government. Unless
"there is something in the decree of confirmation other-
"wise limiting the extent or the form of the tract, they
"should control the officers of the United States in
"making their surveys. It was so held by this Court in
"Graham *v.* U. S., 4 Wall. 259, and in Pico *v.* U. S.,
"5 *id.* 536.

"In the case at bar, the Surveyor-General for Cali-
"fornia disregarded the boundaries established upon
"the juridical possession delivered to the grantee. He
"proceeded upon the conclusion that the confirmees
"were restricted by the decree to one square league, to
"be measured out of the tract within those boundaries,
"which exceeded that amount by about fifteen hundred
"acres. * * * * * * * * *
"Their possession was therefore that of simple in-
"truders and trespassers without color of right."

Van Rynegom *v.* Bolton, 95 U. S. 33.

This action as appears in the transcript (pages 102 to 109) was fully tried in the Circuit Court *and the defendants actually ejected.* In these proceedings Wormouth's surname was inadvertently given as "Edward" in place of "Ebenezer." Wormouth himself says (Tr., p. 76), "I was one of the defendants in this suit"; the United States Marshal (Tr., p. 108), certifies that he ejected him. When that case went to the Supreme

Court no bill of exceptions was filed, and therefore the grant of juridical possession was not actually before the Supreme Court, but the Court has shown that if the grant was specific it should control, and it affirmed the judgment of the Circuit Court which did so hold.

The decree of the United States District Court confirms the grant *according to the grant of juridical possession*, and the possession and title of the Reeds were in nowise disputed until in 1858, when the Land Department simply construed *the effect of the decree*. The Land Department contended that the grant was one of quantity and not of boundaries, and upon that theory proceeded to reduce the grant by lopping off 1,500 acres, which included this land.

Van Reynegom *v.* Bolton, 95 U. S. 33.

This was their only contention against the Reed claim to that part of the grant which they were in possession of that included the land in dispute.

For fourteen years this matter was hung up in the Land Department, and it finally rendered the decision through Secretary Delano rejecting the Mathewson survey and ordering the survey in grants with the grant of juridical possession. In his decision Secretary Delano says:

> "The Assistant Attorney-General, in his opinion, a "copy herewith, discusses at length the questions of "law and fact involved in this case, and I fully concur "in the conclusion at which he arrives; that that de- "cision of the Commissioner be reversed, and that the "Surveyor-General be directed to make another survey, "including the land within the boundaries, particu- "larly described in the decree of the District Court, by "reference to the confirmation of the Board of Land "Commissioners, *being the land covered by the juridical "possession of the original claimant Reed.* I am of the "opinion that the decree of the District Court con- "firmed to the claimants all of the land lying within "the boundaries shown by the map attached to the ex- "pediente." (Decision rejecting Mathewson survey). Decided January 6th, 1872.

The contention that the grant was one of specific quantity

was then finally settled and definitely abandoned by the Department and the decision became *res adjudicata* in the Department.

Then arose another peculiar condition of things as disclosed by the record in this case and the published decisions of the Land Department. There seems to have been a long-drawn-out contest over the re-survey of this property, which was left to two surveyors by the name of Ransom & Allardt. Allardt's testimony, which appears in the transcript of proceedings in the Land Department (pp. 66 to 72), shows that no survey was actually made. He says (Tr., p. 68): "I am not aware that Leander Ransom made any survey in the field pertaining or relating to the western boundary of the Rancho Corte Madera del Presidio. I think not—I am very positive on that point, that he made no survey in the field, because I furnished all the field notes that he returned. The Ransom survey was a compilation of State and private survey. The portion of that survey which was made by the State was all of the meanders of the bay and of the marshes. Leander Ransom returned two sets of field notes of the Rancho Corte Madera del Presidio, one of which included the salt marshes and the other excluded them." (Allardt (Tr., p. 71), referring to the western boundary of the grant, says: "I think in the field notes of the juridical survey under the Mexican government it affixes the Arroyo Corte Madera del Presidio as the western boundary."

"The juridical measurement commenced at the point on said Arroyo and rose from that point northerly, which described the Arroyo as the boundary of said grant and identifies. I testify from recollection, and feel pretty positive on that point." Throckmorton's testimony, also, in the transcript of the Land Department (pp. 54 to 63), makes this more clear and particularly (p. 61, at folio 72, down to folio 73, on p. 62). This evidence, which by stipulation was admitted in the ejectment part of the proceeding, is wholly uncontradicted by any testimony in the case and conforms exactly to the statement in the grant of juridical possession. In the grant of juridical possession it says:

> "They commenced said measurements from the solar
> "(house-lot) which faces west and stands at the slope
> "and foot of the hills which lie in that direction, and
> "on the edge of a forest of redwoods called 'Corte Ma-

"dera del Presidio,'; they commenced their measure-
"ments, and, *going from south to north*, they first meas-
"ured to the Arroyo called 'Holon,' where is another
"forest of redwoods called 'Corte de Madera del San
"Pablo,' 90 cordeles of 50 varas."

By reference to the colored map it will be seen that this exactly conforms to the blue line marked "A" to "A2."

The patent line, the yellow line on the map, begins a mile west of the solar, as the field notes show, runs in a different direction to a point a mile and a half beyond the Arroyo Holon across an impassable marsh to a slough. It leaves out the very thing which gave the ranch its name, to-wit: the forest of redwoods, and includes a large quantity of marsh land and the large Peninsula Island; the survey includes also a part of the land excluded by Mathewson ,and grants close on to 8,000 acres within lines of which the yellow line is the western boundary.

There is not a bit of evidence in the case in support of the yellow line which constitutes the western boundary under the patent, and we simply show by reference to the facts we have just stated enough to demonstrate how completely it violates the boundaries fixed in the grant of juridical possession, which are the boundaries as thus found in the decree of the United States District Court. Marsh lands were never granted by the Mexican government, a fact that stands as part of the judicial history of this country. In short, the decree of the District Court by making the grant of juridical possession a part of it granted the exact land that the Reeds possessed, namely, that within the blue lines "C" to "A," "A" to "A2" and "A2" to "D," and the high water lines the rest of the way.

The Land Department, on the other hand, without the slightest authority whatever, either in law or by the reason of any fact in the case, granted an entirely different body of land to the Reeds by this patent; they having years before receiving the patent parted with title to the land in controversy.

The singular part of the transaction is emphasized by the decisions in the Land Department, following Secretary Delano's, of two of the Secretaries, whose decisions changed the effect of Delano's as to following the grant lines, and Secretary Teller following then reversed them both and held that the Delano decision was *res adjudicata* in the Land Office and must be followed. When he went out of office his successor

accepted the compiled map of Ransom & Allardt and issued the patent upon it. It is clear, therefore, that the Land Department never followed the requirements of the decree of the United States District Court and wholly failed to make the proper survey. This makes their entire survey and the patent issued upon it absolutely void, so far as we are concerned, as we are in no wise estopped by the acceptance of the patent by the Reeds, they having parted with all title to our land twenty years before they accepted the patent. Upon this question the Court has said:

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"It is nevertheless a clear distinction established by "law, and it has been often asserted in this Court, that "even a patent from the Government of the United "States, issued with all the forms of law, may be shown "to be void by extrinsic evidence, if it be shown such "evidence by its nature is capable of showing a want "of authority for its issue."

Doolan *v.* Carr, 125 U. S. 638.

"The duty of the Surveyor-General, under all these "acts, is to survey and locate the confirmed tract, in "conformity with the decree. It is the only guide "which is furnished to him."

Fossat Case, 2 Wall. 714.

"The material question is, whether the survey ap- "proved conforms to the decree of confirmation. There "must exist a reasonable conformity between them, or "the survey can not be sustained." * * *

* * * * * * * * * * * *

"The answer to all efforts of this kind is that the de- "cree is a finality, not only on the question of title, but "as to the boundaries which it specifies. * * "the question of its correctness is forever closed."

United States *v.* Halleck, 1 Wall. 453.

" * * The issuing of a patent is a minis- "terial act, which must be performed according to law. "A patent is utterly void and inoperative which is is- "sued for land that had been previously patented to "another individual. The fee having been vested in the

"patentee by the first patent, the record (second) could "convey no right. * * The patent of the de- "fendant having been for land reserved for such appro- "priations, is void."

Stoddard *v.* Chambers, 2 How. 318.

"It has been repeatedly held by this Court that a "patent is void which attempts to convey lands that "have been 'previously granted, reserved from sale, or "appropriated. It would be a dangerous doctrine' "(say the Court in New Orleans *v.* United States) 'to "consider the issuing of a grant as conclusive evidence "of right in the power which issued it. On its face it is "conclusive and can not be controverted; but if the "thing granted was not in the grantor no right passes "to the grantee. A grant has been frequently issued "by the United States for land which had been pre- "viously granted, and the second grant has been held "to be inoperative.'"

Best *v.* Polk, 18 Wall. 117.

These last two cases in particular are with us because they simply held that the action of the Land Department, being in excess of its authority, raises no presumption and is conclusive on no one. The authority of the Land Department was limited to make the survey and grant the patent that followed the decree of the District Court and the grant of juridical possession and anything it did decide of that was void.

Graham *v.* United States, supra.
Pico *v.* United States, supra.
Van Rynegom *v.* Bolton, supra.

In these cases the United States had no title whatever to the land in question, and having none the Land Department had nothing that would legally grant or encumber it, and upon this point this Court says:

"The remaining exceptions * * * pre- "sent one general question of great importance. " * * * It is this: Is it, in any, and if in

"any, in what cases, allowable, in an ejectment, to im-
"peach a grant from the State, for causes anterior to
"its being issued? * * * (p. 99). But there
"are cases in which a grant is absolutely void; as where
"the State has no title to the thing granted, or where
"the officer had no authority to issue the grant. In
"such cases, the validity of the grant is necessarily ex-
"aminable at law."

Polks Lessee *v.* Wendell, 9 Cranch 97-99.

It will be seen from an examination of the record that the only thing that is urged against the title of Gardner is in the action of the Land Department in the different particulars specified, and the whole case of our opponent is based upon the proposition that the Land Department having decided this matter against us we are concluded by its decision.

While all the althorities in principle hold that the Land Department has no power to decide questions of title between litigants *who claim under* on the one hand and those *who claim against* the United States on the other.

We will endeavor clearly to define the distinction between the judicial acts of the Land Department and those exercised by the Courts. Judicial powers may be said to be of two kinds, general and incidental.

General judicial powers are those exercised by a Court of Justice in a determination of a definite controversy as to fact, or upon the law, or upon both, and wherein the ultimate object to be attained and the final act in the proceedings is in itself an adjudication.

Incidental judicial powers are those exercised by the legislative or executive departments of the Government as conditions precedent to the exercise of a legislative or executive function, as the case may be, and wherein the ultimate result is in itself either a legislative or an executive act.

This is the rule that has been followed by this Court in the Minnesota and Nebraska railroad rate cases, where the Court held that in fixing railroad rates the Railroad Commissioners must first judicially establish the essential basis as a condition precedent to the performance of the purely legislative act of determining the amount of the rate to be fixed.

Chicago, etc., R. R. Co. *v.* Minnesota, 134 U. S., 114.
Smyth *v.* Ames, 169 U. S., 466.

The Land Department, being a part of the executive branch of the Government, acts judicially only for the purpose of establishing judicially a condition precedent, in the ascertainment of a state of fact, which is to constitute the basis of the performance of its purely executive act of disposing of public land.

This disposition is by means of a Federal patent. The conclusiveness of the patent depends wholly upon its character. If it is an actual grant of a valid title of the United States, it is conclusive in its recitals; if, on the other hand, it operates merely as a quit-claim on the part of the United States, it is conclusive only so far as a quit-claim deed is ordinarily conclusive upon a private person who executes a quit-claim deed.

In carrying the treaty into effect Congress delegated to the Land Department the power to issue a patent, and that patent is in the nature of a quit-claim from the Government, and has been repeatedly so held.

> "In the first place, the patent is a deed of the United "States. As a deed, its operation is that of a quit- "claim, or rather of a conveyance *of such interest as the "United States possessed in the land*, and it takes effect "by relation at the time when proceedings were insti- "tuted by the filing of the petition before the Board of "Land Commissioners.
>
> "In the second place, the patent is a record of the "action of the Government upon the title of the claim- "ant as it existed upon the acquisition of the country. "Such acquisition did not affect the rights of the in- "habitants to their property. They retained all such "rights, and were entitled by the law of nations to pro- "tection in them, to the same extent as under the for- "mer government. The treaty of cession also stipu- "lated for such protection."

Beard *v.* Federy, 3 Wall., 491.

> "Counsel for the plaintiffs has argued that a patent "from the United States is final and conclusive on "everybody, and that the title which it confers cannot "be disputed in a Court of law.
>
> "No doubt, where the patent is for land to which the "Government had an undisputed title, the proposition

"is generally, if not always, true. But the United "States, in dealing with parties claiming under Mexi- "can grants, lands within the territory ceded by the "treaty with Mexico, never made pretense that it was "the owner of them. When, therefore, guided by the "action of the tribunals established to pass upon the "validity of these alleged grants, the Government "issued a quit-claim—an admission that the rightful "ownership had never been in the United States, but "had passed at the time of the cession to the claimant "or to those under whom he claimed. This principle "has been more than once clearly announced in this "Court. The leading cases are Beard *v.* Federy, 3 "Wall., 478; Henshaw *v.* Bissell, 18 id., 255; Miller *v.* "Dale, 92 M. S., 473."

Adams *v.* Norris, 103 U. S., 593.

It has also been held that if the Land Department failed in the first instance to quit-claim as much land as it should have quit-claimed by the patent, that it had power to grant further patents of that character until the rights of the private owner had been complied with.

Adams *v.* Norris, supra.

IN BRIEF, UPON EVIDENCE WHOLLY WITHOUT LEGAL OR MATERIAL CONFLICT, THE LAND IN DISPUTE WAS AN INTEGRAL PART OF THE GRANT TO AND JURIDICAL POSSESSION OF REED LONG BEFORE THE CONQUEST AND TREATY, AND THIS, COUPLED WITH THE FACT THAT GARDNER IS THE UNQUESTIONED SUCCESSOR IN ESTATE TO REED, AND THAT THE LEGAL POSSESSION OF THE LAND HAS BEEN CONTINUOUS IN REED AND HIS SUCCESSORS DOWN TO AND INCLUDING GARDNER, ESTABLISHES A TITLE IN GARDNER, OF WHICH, WE FEEL JUSTIFIED IN EXPRESSING THE OPINION THAT NO POWER ON EARTH CAN LEGALLY DIVEST HIM OF IT.

## II.—WORMOUTH'S WANT OF TITLE.

The part of the first finding:

> "That on the first day of February, A. D. 1891, "Ebenezer Wormouth was and for a long time prior "thereto had been the owner of," etc.,

said premises, is not only unsustained by the evidence but positively against it.

Wormouth himself admits enough to substantiate our statement.

The evidence which plaintiff claims sustains it begins with his homestead entry made on May 20th, 1881 (Tr., p. 138), includes simply his own testimony (Tr., pp. 138-144), and the steps required to be taken to perfect a title to public lands. This evidence is wholly insufficient to sustain the above-mentioned finding.

To begin with, plaintiff frankly admits that he never had or was in possession of the whole of the forty-six acres in issue, in fact but a few acres of it. Says: "Have been in possession of part of that land" (p. 139). "I didn't know whether it would be United States land or anything else" (Tr., p. 139). See map plaintiff's exhibit, which shows portion plaintiff admits he never possessed. "I went there in 1859, the house that I went and lived in was on land that is patented to Reed heirs" (Tr., p. 140). "I lived on the grant land as patented until 1861-2." Says he built a house west of grant land "after filing a homestead" (Tr., pp. 141-142). "In 1881, around there.." "I never had possession of this land—the 33 acres" (Tr., p. 142). "Mr. Throckmorton had possession of it." "I don't know how many years." "After his death Miss Throckmorton held possession of it." "When he went to fence it I informed him I claimed that land." Wormouth's notice to Throckmorton in 1872 (see Tr., p. 75) shows from the above testimony that from 1872 at least until this action began, Jacob Gardner and his predecessors were in actual and exclusive possession of nearly all the land in dispute. There is no conflict on this point at all.

The ownership of public lands remains in the Government and subject to the control of the Interior Department until the patent issues.

> Case of Filkins *v.* U. S. L. Dec., p. 49.
> Case of Hall *v.* U. S. L. Dec., p. 174.

The homestead and pre-emption entry of Wormouth was absolutely void.

He must be first in actual and exclusive possession of the land.

If another be in ahead of him under color of right, he cannot lawfully enter the land, and if he is permitted to do so the entry is void.

Atherton *v.* Fowler, 96 U. S., 513.
Hosmer *v.* Wallace, 97 U. S., 575.
Quimby *v.* Conlan, 104 U. S., 430.

The homestead and pre-emption entries of Wormouth were absolutely void. An applicant for Government land must be in actual and exclusive possession of the land. If another is ahead of him under color of right, the applicant cannot lawfully enter the land, and, if permitted to do so, the entry and all subsequent proceedings based upon it are void, as are the acts of the land officers predicated thereon.

Atherton *v.* Fowler, supra.
Hosmer *v.* Wallace, supra.

And upon this head Mr. Justice Field, in speaking for this Court, says:

> "A settlement cannot be made upon public land al-
> "ready occupied; as against existing occupants, the
> "settlement of another is ineffectual to establish a pre-
> "sumptive right. Such is the purport of our decisions
> "in Atherton *v.* Fowler, 96 U. S., 513, and Hosmer *v.*
> "Wallace, 96 U. S., 575."

In other words, the title of the Government must be valid before the Land Department has power to dispose of it. The Atherton case is very clear upon this point.

> "But if these officers (Land Department) acted with-
> "out authority; if the land which they purported to
> "convey had never been within their control or had
> "been withdrawn from that control at the time that
> "they undertook to exercise such authority. Then

"their act was void for want of power in them to act "on the subject matter of the patent not merely void- "able."

Doolan *v.* Carr, 125 U. S., 638.

That the patent is nowise conclusive upon the Courts where a want of authority to act exists, is equally true.

"It, however, appears very clearly that the contro- "versy turns upon the validity of the patent from the "United States, under which plaintiff claims title, and "which was denied by the defendants. The Circuit "Court for the District of California, therefore, had "jurisdiction of the case, as one arising under the Con- "stitution and laws of the United States."

Doolan *v.* Carr, supra.

This case fully supports our contention that Wormouth's patent is void for want of authority on the part of the Land Department to issue the patent, and that such want of authority may be shown by extrinsic evidence.

It will be seen that even if Gardner's title was defective Wormouth could not recover even costs against Gardner, for, under the laws of the United States, his title was too defective to be a muniment of title upon which any Court could base a judgment in his favor.

## III.—THAT THIS QUESTION IS RES JUDICATA.

So far as respondent is concerned, the decree of the United States District Court is *res judicata* and in bar of respondent's claim to the land in controversy.

To sustain this objection it must appear that that decree is:

1. A final judgment.
2. Upon the merits.
3. Between the same parties.
4. For the same cause of action.
5. Rendered by a legally constituted tribunal.
6. By a tribunal having jurisdiction:
   (a) Of the cause;
   (b) Of the person.

Hermann on Estoppel and Res Judicata, Sec. 64.
Boswell *v.* Otis, 9 How., 348.
Durant *v.* Oindroth, 97 N. Y., 133.
Bank *v.* Peabody, 55 Vt., 492-45; Am. R., 632.

There is no question about the finality of the judgment or upon the proposition that the judgment was upon the merits.

The designation "between the same parties" legally includes all their heirs and assigns—all their successors in interest who claim under them. Gardner stands in the shoes of the Reed heirs, while Wormouth stood in those of the United States; therefore, the action is legally between the same parties, being between their privies.

The cause of action is in principle identically the same. The matter beforethe District Court was a question as to whether or not the "Reed Ranch" and every part of it was or was not a part of the public domain; therefore a part of the same cause of action, requiring the same determination, is legally "the same cause of action." The legality of the tribunal and its having jurisdiction are beyond any question whatever.

Therefore the subject matter of the controversy originally in the District Court was the same controversy that was sought to be determined in the Superior Court, and was therefore *res adjudicata*. The only difference is that the Superior Court was without jurisdiction of the subject matter of the action, as will hereafter be shown.

## IV.—THE STATE COURTS WITHOUT JURISDICTION.

The three preceding questions comprise the legal issues involved in the original case—the ejectment suit—and are covered by the issues framed by the complaint of Wormouth, on the one hand, and the answer and supplemental answer of the Gardners, on the other. Another question arises that was argued extensively in the State Supreme Court, and that is the important question of jurisdiction.

*Had the State Courts of California the power to determine the issues presented to them in the ejectment end of this controversy?* Upon the original pleadings these Courts had apparent jurisdiction, and even upon the supplemental answer being filed it was not made clear that they had not, because issues of fact might have arisen that would be covered by pleadings of that

character, but when the evidence was all in and the case submitted in the Superior Court, it became perfectly apparent that there was only one question before that Court in the ejectment part of the proceeding, and that was, *as to whether or not the land in controversy was, under the Treaty of Guadalupe Hidalgo, public or private land.*

The title shown by Gardner proceeded entirely upon the theory thaf it was private land, and if it was private land under the treaty then there is no doubt whatever but that Gardner's title was complete and absolute.

Wormouth's title was based wholly upon the theory that under the treaty it was public land, and could only be maintained upon that theory; therefore, in determining which of these two titles should prevail, the Court was necessarily called upon to say whether or not the land was public or private land in the treaty.

The Superior Court was absolutely without jurisdiction for two very important reasons:

First—Because that question had been finally adjudicated by the District Court in 1856 by a decree which became final, and that the Superior Court had no power to do otherwise than to give effect.

Secondly—Because by virtue of the Act of Congress of 1851 the power to make that determination was vested exclusively in the United States Courts.

It will be thus seen that as the case was finally presented to the Superior Court that Court was without jurisdiction to determine it.

The jurisdiction of a Court or the want of it is not necessarily to be determined by the pleadings; when apparent upon the pleadings themselves the absence of jurisdiction may be said to be patent, but when it requires the proof of all the facts in the case or of some of them upon the trial, it may be designated latent.

The latent want of jurisdiction in this case developed upon the trial, and as the record discloses, is more than clear.

The testimony in behalf of the Gardners was simply the proof of their title and possession under the Mexican grant, and that the land in question was a part of the land actually delivered to Juan Reed. Wormouth did not attempt to dispute any fact that the Gardners proved, and, on the other hand, he contented himself by proving his title from the Government of the United States, which left, as stated, simply the

conflict of two titles, to be determined by the one primal question: *Was the land public or private land under the treaty?*

The equitable issues which were framed by the cross-complaint of Jacob Gardner and Wormouth's answer thereto stand independent of the legal issues, and were within the jurisdiction of the Superior Court to determine.

A question of jurisdiction arises either *before the Court acts*, and is raised to prevent the doing of something it has no power to do, or is raised *after the Court has acted*, and has actually exceeded its authority. In the former case we are to consider just what is patent upon the pleadings, but in the latter we must ascertain from the whole record what its act was.

In looking at this record under this head we must first find out *what the Court did*. What issues it acted upon in order to render judgment.

Looking, therefore, at the record, we find it did just one thing in the ejectment branch of the case; it tried and rendered its decision upon but one essential question; *it decided, in effect, that the land in dispute under the treaty was public, and not private land by the grant of juridical possession*, the official act of delivery *the livery of seisen*.

The Act of March 3, 1851, is entitled "An Act to ascertain and *settle* land titles in California."

Its one purpose was to provide a means of having a judicial settlement of that question in every case by a final decree binding upon every Court or other authority in the land.

Such a decree was rendered in this case by the District Court in 1856, and no Court of the State of California has jurisdiction to anywise alter or review the effect of that decree, or to do otherwise than give it full effect. Were the decree imperfect or ambiguous in any particular, it must be corrected in the District Court by a bill of revivor or some other appropriate proceeding, or, in the absence of a remedy, then by an appropriate proceeding in the Circuit Court; but never, under any circumstances, without express authority from Congress has a State Court any such power.

It is true the action of ejectment under the broad averments of the pleadings might have been tried upon many other issues, but the case was tried upon one main issue, upon which rests its judgment—its final *act*; the only *effect* of the judgment was to make the land public land under the treaty—*a power that did not exist in the Superior Court.*

The proposition that the *effect of the act* of a Court determines, after judgment, the question of jurisdiction, is in principle upon all fours with the rule so clearly laid down by this Court in delineating the extent of its own jurisdiction over decisions of State Courts, particularly with reference to whether or not the Federal question was raised in the State Courts. This Court has uniformly held that *it is the act and not the word of the State Court* that will determine; it is the effect of its decree and not the opinion it expresses that settles the matter.

> "If the Federal question is presented by the record,
> "and its decesion is necessary to the determination of
> "the case, a judgment which rejects the claim, but
> "avoids all reference to it, is as much against the right,
> "within the meaning of the section, as if it had been
> "specially referred to and the right directly refused."
>
> Chapman *v.* Goodnow, 123 U. S., 540.

This is the equivalent of saying it is the act and not the word of the Court that counts. So has the same principle been enunciated in other cases, notably:

> Capital Bank *v.* Cadiz Bank, 172 U. S., 430.
> California Bank *v.* Kennedy, 167 U. S., 365.
> Armstrong *v.* Treasurer, 16 Peters, 281.

The only difference is that in these cases the *act of the Court rather than its words* determines the question of the jurisdiction of this Court over judgments, while we apply the same principle to show that the final act, the only material act of the State Court, was with reference to a subject over which the Federal Courts have exclusive jurisdiction, to-wit: *the private or public character of this land under the treaty.*

> Doolan *v.* Carr, 125 U. S., 638.

Clearly, then, the State Courts were wholly without jurisdiction to render a judgment, the effect of which was to nullify the decree of the District Court.

## Part II—EQUITABLE ISSUES.

The equitable branch of this case is practically a separate suit from the ejectment proceeding which has been discussed under the four heads preceding. Our position is that even though the State Courts were without jurisdiction to determine the ejectment proceeding, still they had jurisdiction to determine the equitable proceeding so long as their decision was consistent with the laws of the United States and the decisions of the United States Courts.

The jurisdiction of the Superior Court was by the Revised Statutes of the United States concurrent with that of the Superior Court over the equitable issues presented by the cross-complaint of Jacob Gardner and the answer thereto. It was purely a Federal question and depends for its determination wholly upon the Federal statutes and decisions.

In his cross-complaint Jacob Gardner asserts the same title that he sets up in the supplemental answer in the ejectment proceeding. He also sets up the application of Throckmorton to the Land Department for patent under the act of July 23rd, 1866, and the decision against Throckmorton he asserts that it was erroneous as a matter of law.

Wormouth's answer simply denies the material allegations of Gardner's cross-complaint.

Upon the trial of the equity issues, aside from proving his title, Gardner simply offered in evidence the transcript of proceedings in the Land Department (Tr., pp. 46-118). There was no conflict in the evidence upon these issues of any material character, and they must be determined wholly upon the transcript of proceedings in the Land Department.

The law is very plain upon the proposition involved and does not require any extended discussion in more than to cite the authorities with perhaps some brief statements of their effect. These issues will be discussed under two heads.

Fifth—The absolute right of Gardner's predecessor, Throckmorton, to the patent under the act of July 23d, 1866, upon the simple proof of his absolute title under the treaty, coupled with the fact that the land has been erroneously excluded from the final survey and patent;

Sixth—That the Wormouth patent, having been issued without authority of law, was void as to Gardner, and consti-

taking a fraud upon his title was in equity held by Wormouth in trust for Gardner's benefit.

These will be designated

V—Wormouth's patent invalid.

VI—Wormouth's patent and trust for Gardner.

## WORMOUTH'S PATENT INVALID.

Fifth—*The absolute right of Gardner's predecessor, Throckmorton, to the patent under the act, upon the simple proof of his absolute title under the treaty, coupled with the fact that the land has been erroneously excluded from the final survey and patent.*

Throckmorton's proof in the Interior Department upon his application under the Act ofJuly 23d, 1866, shows three essential facts that entitled him to the patent.

A—His own absolute right and title as the lawful successor in interest of the Reed title.

B—That the land he held was an integral part of the land of which juridical possession had been delivered to Reed.

C—That it had been excluded from the final survey and patent.

This entitled him to the patent, because, there being no conflict in the evidence, he was not bound to make any further showing; *the questions of use and good faith upon which the department lays much stress are absolutely concluded by the fact that Throckmorton had a clear title.*

The seventh section of the Act of July 23d, 1866, provides:

> "That where persons in good faith and for a valuable "consideration have purchased lands of Mexican "grantees or assigns, which grants have subsequently "been rejected, or where the lands so purchased have "been excluded from the final survey of any Mexican "grant; and have used, improved and continued in ac- "tual possession of the same as according to the lines "of their original purchase, and where no valid adverse "right or title (except of the United States) exists, such "purchasers may purchase the same."
>
> (14 Stat., 218.)

Under this section two classes of applicants are provided for:

(a) "Where persons in good faith and for a valuable con- "sideration have purchased lands of Mexican grantees "or assigns, *which grants have subsequently been rejected.*"

(b) "Where lands so purchased *have been excluded* from "the final survey of any Mexican grant."

The former class of applicants were those who thought in good faith that they had acquired a valid Mexican title, when, in truth, they had not, *because the grant had been rejected* by the District Court or Board of Commissioners of course, and the Government, acting purely *ex gratia*, gave them a chance to acquire a good title at the established price. The land in this case, *by reason of the rejection of the grant*, was judicially ascertained to be *public land* under the treaty. The patent in this class of cases would clearly be *an actual grant of the land*. The second class, however, relates to lands included in valid Mexican grants, *not only not rejected, but acknowledged and confirmed*, and wherein the Land Department had made an incorrect survey by which it had *excluded land* which should have been included; had failed to conform to the decree of confirmation. In such cases the Act directed the Land Department to issue a patent, the legal effect of which was simply to quit-claim the land to the grantee; it was a simple method whereby the Government acknowledged as valid title the erroneous act of its Surveyor had unjustly clouded.

In the former class (a) the applicant was required to show:

1—Purchase of a *supposed* Mexican title.

2—Good faith.

3—A valuable consideration.

4—Possession.

In the second class (b) the applicant must have shown:

1—The purchase of a *valid* Mexican title.

2—Of land *excluded* from the final survey.

3—Possession.

Upon such showing being made, respectively, the Government granted to the former *the title to the land*—to the latter it issued a patent in effect a quit-claim.

The words in the second part of the sentence, "so purchased," are intended to be the equivalent of the words "purchased lands from Mexican grantees or assigns," the qualifications of "good faith" and "valuable consideration" clearly applying to the class who had no title whatever, as the possession of a valid title would be legally conclusive upon the questions of "good faith" and "valuable consideration." The expression "continued in actual possession of the same as ac-

cording to the lines of their original purchase" simply means "continuous possession."

This analysis, we submit, presents a fair and legal interpretation of the section.

The decision of the Secretary of the Interior (Tr., pp. 126 to 132) is what we have to deal with. The rule to be applied in these cases is this:

That the judicial findings of fact made by the officers of the Land Department in the exercise of their purely incidental judicial powers, in the establishment of a condition precedent to their act in granting a title to public land upon issues of fact properly before them, will not be disturbed and cannot be reviewed by the Courts.

This is submitted as a fair statement of the principle laid down repeatedly by this Court, and epitomized in the following cases:

Johnson *v.* Towsley, 13 Wall., 72.
Rector *v.* Gibbon, 111 U. S., 291.
Bohall *v.* Dillon, 114 U. S., 47.
Widdicombe *v.* Childers, 124 U. S., 400.

This rule has been applied generally where the question arose over lands when the primary title was in the United States, and not in cases where the United States never owned the land, as in the case at bar. In such cases, it seems clear to us in principle, though we find no case exactly of that kind, that even in respect to questions of fact the decision of the Land Department would conclude nothing at all.

The Land Department cannot make title for the Government to land it does not own, which it would do in case its erroneous decision that private land was public land purely upon questions of fact was allowed to stand.

THE LAND DEPARTMENT HAS NO POWER TO DECIDE ANY QUESTION OF TITLE BETWEEN THE UNITED STATES AND THOSE WHOSE CLAIM IS AGAINST, AND NOT UNDER IT.

This involves three conditions:

(a)—The existence of issues of fact.

(b)—cognizable before the department.

(c)—determinable only in the disposition of a valid title of the United States to public lands.

Applying this rule and this analysis to the decision of the

Secretary, we find that he assumed to find three facts against Throckmorton:

1—Want of good faith.

2—Want of valuable consideration.

3—Land not private, but public land under the treaty.

Applying the first condition (a), there were no issues of fact at all, as the transcript of proceedings (Tr., pp. 46-118) clearly shows; simply because the evidence was wholly uncontradicted, unimpeached and unconflicting. There being no facts in dispute, there could be no issues of fact and no findings of fact. This being true, the Secretary was bound to simply decide the law—the legal effect of undisputed facts—without speculating upon probabilities.

The positive, unimpeached and uncontradicted testimony of Throckmomton (Tr., p. 60), the claimant, and of Allardt (Tr., p. 66), one of the two surveyors who compiled the patent map—both testified positively that the map was a compilation—not a survey (as required by law)—and that the "Arroyo Corte Madera del Presidio" (along the blue line A to A2 on the colored map) was the western boundary of the grant. There was not a line, not a scintilla of evidence against that testimony. Not a bit of testimony was offered that the patented western boundary (the yellow line on the colored map) was the true boundary, nor was there a bit of evidence of any kind to prove, or even tend to prove, that it was the line. On the contrary, there was the positive, uncontradicted and unimpeached testimony of the man who furnished the data and helped compile it that the true boundary was the Arroyo Corte Madera del Presidio.

The Secretary could in no wise render any finding against Throckmorton's claim that the western boundary was where he put it. So the evidence did show without any conflict that fact, and the Secretary's opinion can, in the nature of things, be no more than a decision upon the effect of the evidence—the law—and subject to review. He also opines upon Throckmorton's "good faith" and "valuable consideration." Those issues are simulated; they were not before him, for he was not trying the question of issuing a patent that would grant title to the land, but merely one that would be a quit-claim of the United States; but, even were those questions before him, he would be absolutely concluded in their decision in Thockmorton's favor.

It cannot be maintained for a moment that Congress ever

intended that the good faith and consideration of one who held a valid and unquestioned title to lands under a treaty, but erroneously excluded by a mistaken survey, could ever be legally questioned. There being no dispute, no conflict, in the evidence, it is with the greatest difficulty that it can be understood where the Secretary drew his unique conclusions from.

The grant of juridical possession in the *expediente* shows that the western boundary line began "at the solar" and went north to the Arroyo Holon (Tr., p. 145), "where is another forest of redwoods," etc., "from this point taking a direction from north to south," etc., the "examination" in the *expediente* (Tr., p. 87) says they led me north to "another arroyo and forest of redwood trees," etc., and they said it was the boundary with the "Pueblo of San Rafael," which fixes the "Arroyo Holon" as the northern boundary, for then they went south. Now, examine the colored map and see how the blue line on the map, A to A2, exactly conforms to this description, even to the commencement at the "solar" by the "little brook" with the "willow thicket" and the "remains of a rancheria called Anamas." Then, to get the direction, look at the diseno (map) (p. 46A), and see how the western boundary line bears northwest to the west of the Mission of San Rafael; then compare the dotted blue line A2 to D, with the north boundary shown on the *diseno* and at the end of either the way *south* to Tiburon is natural. These lines exactly conform to the grant.

On the other hand examine the yellow line B to B3. It starts beyond the willow thicket ¾ of a mile from the "solar" (Reed's House) and goes northeast to the Holon, but not to the other forest of redwoods, from thence it crosses a marsh to a slough, B3; from there the line goes *northeast* in place of *south*, it makes one end of the Aroyo Holon part of the *western* and not of the *northern* boundary. (Not only was the Holon the northern boundary, but the "forest of redwoods" as well.) This is enough to show how utterly the patent disregarded the grant of juridical possession and the decree of the District Court. Again, the Mathewson survey included 4,460 acres and excluded 1,500 (about), in all 5,900 acres. The patent conveys 7,854 acres, of which one-half of the 1,500 Mathewson excluded is included. The Reeds hal sold the other 750 excluded by the patent, which added to the 7,854, so they had in all the benefit of 8,500 acres, or 2,500 acres more than Juan Reed ever claimed.

*Now can this decision of the Secretary of the Interior creating a paper title in Wormouth from the United States to land that never was public land operate to deprive us of an otherwise unquestioned title fortified by sixty years' continuous possession.*

A decision of the department in excess of its authority is void:

Simmons *v.* Wagner, 10 U. S., 260.
Polk *v.* Wendell, 9 Cranch., 303; also, 5 Wheat., 303.
Frisbie *v.* Whitney, 9 Wall., 187.

These cases hold that the act of the Land Office granting a patent for lands already sold is void for want of authority, but in these cases the primary title was originally in the United States. *A fortiori*, then, it is true, when the United States never had title.

In brief, Throckmorton complied with the statute, and the department could only grant him the quitclaim patent applied for not, and its decision in Wormouth's favor is void.

## WORMOUTH'S PATENT A TRUST ONLY.

SIXTH—*That the Wormouth patent, having been issued without authority of law, was void as to Gardner, and constituting a fraud upon his title was in equity held by Wormouth in trust for Gardner's benefit.*

Upon this we simply cite the authorities.

Johnson *v.* Towsley, 13 Wall. 72.
Ricter *v.* Gibbon, 111 U. S. 291.

And the same is respectfully submitted.

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